individual state employees in carrying out those procedures. I based my decision on California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06 (1980), in which the Supreme Court found that the active state supervision requirement was not met where the state merely enforced the prices set by the private parties without any review of the reasonableness of the prices or monitoring of market conditions. The purpose of the second prong is to prevent the state from authorizing private parties violating the antitrust laws without in some way regulating their conduct. Id. at 106.

Thus, I found that the focus of the second prong of the state action defense is on the procedures and regulations by which the state implements it regulation of the authorized collective rate-making. My decision made irrelevant plaintiffs'

argument that the regulators in the affected states were failing to properly supervise the rating bureaus as required by their respective state statutes because of improper payments. Plaintiffs' counsel supplied with their extensive discovery and my opinions on the state action defense, were able to legitimately conclude that plaintiffs' claims could not withstand defendants' imminent motion for summary judgment based on the state action defense.

The objecting states argue that the plaintiffs' counsel have taken too pessimistic a view of the plaintiffs' situation. They argue that the state action defense depends on each state's laws and thus that the strength of the defense varies from state to state. The only evidence the objecting states rely on, other than the letter from the assistant attorney generals from

Wisconsin, is the fact that the FTC has not dropped its case against the defendants in all the states. However, this fact by itself is insufficient to support an inference that the plaintiffs have a viable claim in the states where the FTC has continued its action, just as the fact that the FTC has dropped its case in some of the states does not mean that the plaintiffs necessarily have no viable claims in those states. The more important factor in my evaluation of the settlement is that the objecting states (with the exception of Wisconsin), which are clearly the parties best able to provide information on their own laws and regulations regarding defendants' collective rate-making, have failed to provide any evidence by affidavit or deposition testimony to support their assertions that the state action defense would not bar plaintiffs' claims in every

affected state. The objecting states are in effect arguing that their own laws impermissibly authorize the defendants to violate the antitrust laws and yet they provide no evidence to support their assertions and there is no indication that they themselves in their respective sovereign capacities have challenged the defendants' conduct.

Wisconsin is the only objecting state even to attempt to provide evidence that defendants are not protected by the state action defense under its regulatory scheme. Wisconsin argues in a letter to the court that Wisconsin regulators have failed to properly evaluate defendants' rate submissions prior to approving them. Wisconsin claims that this failure means that the second prong of the state action defense has not been met in Wisconsin. As I have noted earlier, I do not find Wisconsin's arguments persuasive.

Firstly, there is no indication that the alleged inadequate supervision by the Wisconsin regulators is attributable to inadequate regulatory procedures - the only relevant criteria under the second prong of the state action defense. Secondly, the settling parties strongly challenge Wisconsin's assertions that it failed to actively supervise the defendants' rating bureau activities. The defendants, in their reply to the letter from Wisconsin, filed on May 15, 1986, refer to the deposition of Norman Wirtz, the insurance analyst employed by the Wisconsin Insurance Commissioner, which was taken as part of the FTC proceeding. The deposition indicates that the rate proposals submitted by the rating bureau in Wisconsin were extensively reviewed prior to their approval. The defendants also note that their submitted rate proposals were accompanied by extensive

written justifications. Thus, I find that the objecting states, including Wisconsin, have done nothing more than present speculative, unsupported challenges to plaintiffs' counsel's evaluation that plaintiffs' claims would stand almost no chance of succeeding in the face of the state action defense in any of the affected states. I will not upset the settlement negotiated by the parties based on the speculative challenges of the objecting states. Reynolds, 584 F.2d at 286.

Although the state action defense in my view presents an almost insurmountable obstacle to plaintiffs' ability to establish defendants' liability, two other substantial obstacles also exist in this case. The first is the exemption from antitrust liability provided for the "business of insurance" by the McCarran-Ferguson Act, 15 U.S.C. § 1012,

where the state regulates the business. As with the second prong of the state action defense, the relevant inquiry in determining whether the state regulates the business of insurance is whether the state has established procedures to regulate the conduct, not whether those procedures were properly carried out. See Schwartz v. Commonwealth Land Title Insurance Co, 374 F. Supp. 564, 575-76 (E.D. Pa. 1974). It is my preliminary conclusion that title search and examination services, which are the main focus of plaintiffs' antitrust claims, are part of the business of insurance since they are closely related to the issuance of title insurance and have been services historically provided by title insurance companies, which would fall under the protection of the McCarran-Ferguson Act. Accord Schwartz, 374 F. Supp. at 572-75 (Title insurance company is protected by

McCarran-Ferguson Act from antitrust liability for collective rate setting of "seller-charge" which covered cost of services incidental to transfer of title, including title search, as part of the business of insurance). But see United States v. Title Insurance Rating Bureau of Arizona, 517 F. Supp. 1053 (D. Ariz. 1981), aff'd, 700 F.2d 1247 (9th Cir. 1983), cert. denied, 467 U.S. 1240 (1984) (escrow services held not to be part of the business of insurance). Although no discovery was conducted specifically on the McCarran-Ferguson Act issue, it would seem that the discovery on the state action defense which showed the involvement of the affected states in the collective rate-making process indicates that the McCarran-Ferguson Act also poses a very significant if not insurmountable obstacle to the establishment of liability against the defendants.

The final obstacle faced by plaintiffs, in even establishing a cause of action, is the filed tariff doctrine set out by the Supreme Court in Keogh v. Chicago v. Northwestern Ry., 260 U.S. 156 (1922).[7] Under this doctrine, the plaintiffs may have been unable to recover damages based on the allegedly anti-competitive rates charged by the defendants because those rates were approved by the state regulatory agency. City of Newark v. Delmarva Power & Light Co, 467 F. Supp. 763, 769 (D. Del. 1979). None of the objecting parties have made any mention of the risks posed by the McCarran-Ferguson Act or the filed tariff doctrine in their challenges to the settlement.

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7. The Keogh doctrine was recently reaffirmed by the Supreme Court in Square D Company and Big Building Supply Corp. v. Niagara Frontier Tariff Bureau, Inc, 54 U.S.L.W. 4520 (May 27, 1986).

The objecting parties also fail to address the difficulties plaintiffs would face in proving damages. There is no evidence that the rates arrived at by the rating bureaus are higher than those that would have been set had the collective rate-making not occurred. Furthermore, plaintiffs would have faced difficulties in maintaining a class action throughout the proceedings. Although for purposes of settlement I have found that certification of a class is appropriate, new problems would arise if the factual issues in this case had to be fully litigated. The decision as to liability and damages in each affected state might well have required the formation of subclasses or separate classes. The objecting states themselves suggest that damages and possibly impact may have to be proved for each class member. Joint Memorandum of Objecting States, p.13. Thus I conclude

that the difficulties set out above would make it extremely unlikely that the plaintiffs would have been awarded any relief, monetary or injunctive, on their claims had this case not settled.

In addition to the substantial legal difficulties outlined above, plaintiffs also faced the practical difficulties of pursuing this complex litigation. This action was settled prior to defendants' filing their anticipated motion for summary judgment based on the state action defense. The expense and effort required to respond to the anticipated motion would have been very substantial. Furthermore, defendants, having invested equivalent time and expense in preparing the motion, may well have been less likely to agree to a settlement once the motion had been filed. Even in the unlikely event that plaintiffs were able to avoid summary judgment on the state action defense,

further motions based on the other defenses would likely follow. These motions and the responses to them would require additional discovery and delay. The actual trial or trials of this case or these cases would also be complex and lengthy involving difficult issues of liability and damages. Thus, even if these cases were to proceed, the delay and expense involved in obtaining any relief for the class would be enormous.

The fairness and adequacy of the settlement can only be properly evaluated by taking into consideration the overwhelming risks which plaintiffs faced in achieving any benefits through litigation. Bogosian v. Gulf Oil Corp., 1985-1 Trade Cas. (CCH) ¶ 65,510, p. 65,549 (1985). The settlement provides two distinct benefits to the plaintiff class. The first is a $5,000.00 enhancement of plaintiffs' title insurance

policies. Agreement of Settlement, ¶ 7(B). The second is an injunction against defendants' participation in rating bureaus until December 31, 1987. Agreement of Settlement, ¶ 7(A). The objecting parties argue that these benefits are of no value to the plaintiffs and thus are inadequate. I find, however, that both the monetary and the injunctive provisions of the settlement are of substantial value to the plaintiffs, even though they may not provide any practical monetary relief to some members of the class. Given the risks posed by continued litigation, the value of the settlement is fair and adequate compensation for plaintiffs' waiver of their claims.

The defendants have agreed to increase the amount of coverage on all title insurance policies issued by them to class members in the affected states. The defendants have also agreed to provide

without charge the last $5,000 of coverage on new policies issued within a year to class members who either bought title insurance for the benefit of others or who bought title insurance from a nondefendant company during the relevant period, from January 1, 1981 to December 31, 1985. The benefits provided in this section of the settlement are applied automatically to the plaintiffs' insurance policies and the defendants have agreed to make good faith efforts to inform class members of the benefits of the settlement when class members are entitled to those benefits (i.e., when an insured class member makes a claim under his policy, or when an insured class member is entitled to a re-issue rate discount on a new policy and the charge for the new policy is affected by the enhancement provisions; or when a non-insured class member applies to purchase a new policy to which the

settlement applies). Agreement of Settlement, ¶ 7(B)(3). Any violation of this provision, which will be contained in the injunction issued pursuant to the settlement, would be enforceable in a contempt proceeding.

The additional $5,000 of title insurance coverage is a benefit to all the class members, regardless of whether or not they make claims on their title insurance policies. The additional coverage represents an additional shifting of the risk of a failure of title from plaintiffs to defendants. As with any insurance, this shifting of risk by itself represents a benefit to the plaintiffs. Although the title search which accompanies the issuance of a title insurance policy is meant to minimize and/or eliminate the risk to the defendants that the title will later prove in some way defective, the defendants have

presented evidence that title insurance companies nationwide have paid out, on the average, close to eight percent of their gross operating revenue on losses in the period between 1981 and 1984. Affidavit of Robert L. Stratton, ¶ 19.[8] Thus, title insurance still represents the shifting of an appreciable risk to the defendants and any additional shifting of that risk is a valuable benefit to the plaintiff class whether or not a loss occurs or a claim is made. Defendants' have asserted that it would cost a class member approximately twenty dollars to purchase the additional coverage provided by the settlement. Affidavit of Robert L. Stratton, ¶ 11. The additional insurance

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8. The objecting states argue that the pay out rate is below 5%. However, their figures are based only on title insurance companies in Ohio, rather than on the nationwide sample on which defendants' figures are based. I place more weight on defendants evidence because it is based on a larger sample.

is, of course, of greater value to those class members whose property has increased in value and who suffer a loss due to a defect in title. The fact that some class members receive this added benefit does not alter the fact that all the class members receive some benefit regardless of whether they ever file a claim.

The additional insurance also provides benefits to the class members because it entitles them to higher reissue and refinance rate credits on policies they may buy in the future. Affidavit of Robert L. Stratton ¶ 12. This benefit arises because these credits on new policies are usually based on the amount of coverage of the old policy. The value of this benefit is not dependent on whether a class member ever files a claim on his title insurance policy. Thus, I conclude that the policy enhancement provision provides a distinct benefit to

the plaintiff class.

Some of the objecting parties including the objecting states argue that the benefits conferred by the settlement do not adequately reflect the fact that some of the plaintiffs were purchasers of large title policies while others were purchasers of small policies. However, one of the legitimate purposes of a settlement is to avoid the necessity of litigating the claims of the individual class members. Further, it is not at all clear that any alleged overpayments for title services would be directly proportional to the amount of coverage of the title insurance policy. Apparently purchasers of large policies are often able to obtain discounts from the defendants. Defendants' Memorandum at p.15. There is no evidence that the challenged services are priced directly on the total amount of the title insurance coverage. The practical

difficulties involved in establishing a proportional enhancement of plaintiffs' policies would substantially increase the cost of the settlement to the defendants and it was reasonable for the plaintiffs' counsel to accept a uniform enhancement as a compromise in the settlement negotiations.

Some of the individual objectors argue that because of their circumstances, they will not benefit from the enhancement provision. Even if I accept the truth of their assertions, they still benefit from the injunctive relief. Also, I would not disapprove the settlement based on a small number of class members who may not benefit from the enhancement provision when to do so would deny all the benefits of the settlement to the entire class. There is no evidence that there are a significant number of class members who will not benefit from the enhancement

provision.

The settlement also provides for benefits to class members who either purchased title insurance for the benefit of others or who purchased title insurance from a nondefendant company. These class members receive the last $5,000 of coverage free on any new policy which they purchase from a defendant within a one-year period running from the final approval of the settlement. The free coverage will reduce the cost of the premium by approximately $20.00. Affidavit of Robert L. Stratton, ¶ 17. The free coverage will also be available for class members who are paying for a new policy when refinancing a home. Given the recent drop in interest rates, it is likely that an increased number of class members will benefit from this provision. Id. at ¶ 18. Many of the objecting parties argue that this provision is

inadequate because it does not allow the plaintiffs to aggregate the free policy coverage they would receive for each title insurance policy purchased during the relevant period and because the benefit provided by this provision only extends for one year. These objections are without merit because, while the alternatives they suggest would increase the benefit to the class members, the adequacy of the settlement is measured not by the absolute value of the settlement, but by the relation of that value to the probability of recovery on the merits. Given the weakness of plaintiffs' claims, the fact that plaintiffs' counsel had to compromise on a settlement which does not provide all the relief suggested by the objectors does not mean that the settlement is inadequate. I note that with the exception of the state objectors, none of the objecting parties even mention the

difficulties plaintiffs would have succeeding on the merits of their claims. The majority of the individual objectors to both the enhancement provision and the new policy provision do no more than complain that they would prefer to receive money rather than increased policy coverage. However, with a class that is estimated to number over three million, even the smallest of direct monetary awards would result in the defendants paying out tens of millions of dollars. It is not surprising then that the defendants refused to agree to any direct monetary settlement when faced with plaintiffs' extremely weak claims. It is also worth noting that out of a class of over three million, only twenty objections were filed other than those filed by the states.'

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9. Counsel for plaintiffs and defendants received hundreds of inquiries

In addition to the monetary benefits provided by the settlement, the plaintiff class also benefits from the injunctive relief specified in the settlement. The settlement enjoins the defendants from participating in any way in rating bureaus

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Footnote 9 continued

as the result of the published notice and sent out a copy of the settlement agreement to each inquiring party. See Perelman Affidavit, Exhibit A (list of parties making inquiries to plaintiffs' counsel), and Defendants' Memorandum, Exhibit G (list of parties making inquiries to defendants' counsel). Allowing for overlap in the lists, close to 600 people received copies of the settlement agreement from counsel for the settling parties. Even if I were to make the unlikely assumption that only those people who made inquiries had received notice of the proposed settlement, the number of objectors still comes to less than 5% of the inquiring class members. See Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3d Cir. 1973), cert. denied, 419 U.S. 900 (1974), reh'g denied, 420 U.S. 913 (1975). (Class action settlement approved even though 20% of the class objected). Thus, I find that the response of the class to the settlement is a factor favoring approval of the settlement.

in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin until December 31, 1987. In the other affected states - Louisiana, New Jersey, New Mexico, New York, Oregon, Pennsylvania and Wyoming - the defendants are prohibited from participating in rating bureaus unless the state has a clearly articulated and affirmatively expressed policy permitting collective rate-making and actively supervises the process. Agreement of Settlement, ¶ 7(A). Plaintiffs' claims are based on the allegedly anticompetitive effects of collective rate-making as to discrete title insurance services, and thus the injunctive relief limiting participation in rating bureaus, as to all title insurance services, provides extensive relief responsive to plaintiffs' claims. The defendants, in the states where they are barred from collective rate-making, are foregoing their right to

participate in collective rate-making even though it otherwise would satisfy the requirements of Southern Motor Carriers. In the other states, the defendants are foregoing their reliance on the other defenses to liability, in particular the McCarran-Ferguson Act defense. Plaintiffs are receiving a benefit in these states that they could not have received at trial, even if ultimately successful, since defendants are foregoing their right collectively to set prices for title insurance premiums as well as settlement services. Title insurance premiums are clearly covered by the McCarran-Ferguson Act. Thus, the injunctive provisions of the settlement provide a substantial benefit to the plaintiff class, beyond that which is sought in the complaint or could even arguably be obtained upon totally successful litigation.

The objectors argue that the

injunction is inadequate since it only applies until December 31, 1987. However, this challenge, like that to the monetary aspects of the settlement, is without merit because it overlooks the fact that plaintiffs would not be likely to receive any injunctive relief were this case to proceed. I also reject the argument that the injunction is valueless because the defendants have already withdrawn from rating bureaus in the affected states. Absent the settlement, there is nothing to prevent the defendants from rejoining rating bureaus in any of the affected states, with the exception of New Mexico where the statutory rule permitting collective rate-making has been eliminated.

The objecting states also argue that only a cash recovery is an appropriate remedy for a price-fixing violation. However, given the weakness of plaintiffs' claims, the defendants assert, and it

seems reasonable to believe, that they would never agree to a cash settlement. Furthermore, non-cash recovery settlements have been approved in antitrust class actions. See In re Cuisinart Food Processor Antitrust Litigation, 1983-2 Trade Cas. (CCH) ¶ 65,680 at p.69,474 (D. Conn. 1983), and cases cited therein. Thus, I conclude that the injunctive and monetary provisions of the settlement provide substantial benefits to the plaintiff class which are fair and adequate in view of the plaintiffs' chances of succeeding on the merits of their claims.

The adequacy of the settlement is not adversely affected by the fact that the monetary provisions are subject to approval by the regulatory agencies in the affected states. The defendants have agreed to use their best efforts to obtain approval of the settlement. Agreement of

Settlement, ¶ 2. To date, the defendants have submitted letters from eleven of the thirteen affected states establishing that those states agree with or at least do not oppose the settlement. Defendants' Memorandum, Exhibits B-F; Defendants' Supplemental Memorandum, Exhibits A-F. Ohio and Wisconsin, the two remaining states, have yet to state a position with regard to approval of the settlement. However, even if these states were not to approve the monetary portions of the settlement, the class members in those states would still have the substantial benefit of the injunctive provisions. Therefore, the objecting states' concern over regulatory approval does not alter the conclusion that the settlement provides fair and adequate benefits to the class.

The objecting states also challenge the settlement as having an illegal

anticompetitive effect. This argument is based on the fact that class members who purchased title insurance for the benefit of others or who purchased from non-defendant companies will have to purchase any new policies from the defendants in order to obtain the monetary benefits of the settlement by way of insurance policy enhancement. The objecting states have provided no evidence in support of their assertions of anticompetitive effect nor have any of the nondefendant title insurance companies, who would be the alleged victims of any anticompetitive effect, presented any objections to the settlement. Also none of the state insurance departments, who are responsible for approving rates, have raised any challenge to the settlements as to purported anticompetitive effect.

I find that the settlement in this case is distinguishable from that in New

York v. Dairylea Cooperative, 547 F. Supp. 306 (S.D.N.Y. 1982), appeal dismissed, 698 F.2d 567 (2d Cir. 1983), where the court disapproved a settlement in an antitrust case because of its anticompetitive effect. The settlement in that case provided for a coupon plan under which the defendants were to distribute "cents-off" coupons for their product over a five-year period. The court was concerned that the coupon plan was little more than a marketing program for the defendants which they could manipulate by controlling the timing and location of the coupons. Id. at 308. In this case, the defendants have no discretion on when or where to provide the benefits specified in the settlement. Also the court in Dairylea was concerned that the settlement made no attempt to specifically reimburse those allegedly overcharged in the past. Id. In this case the settlement benefits are targeted

directly at those who have bought title insurance in the past. Thus, I find that the concerns raised by the court in Dairylea are not present in this case. Furthermore, settlements involving redeemable coupons have been approved by other courts in the past. See In re Cuisinart, ¶ 65,680 at p.69,474, and cases cited therein.

My conclusion therefore is that, based on the relevant factors, the settlement negotiated by the parties in this case is reasonable, fair and adequate. The settlement was negotiated for the plaintiff class by competent counsel who observed their duty to protect the interests of the entire class and who had the benefit of extensive discovery when evaluating the case. The settlement they worked out provides substantial benefits to the entire plaintiff class when considered in light of the almost

insurmountable difficulties that the plaintiffs would have faced in obtaining any relief had they continued with this litigation. The complexity and expense of continued litigation only add to the legal difficulties plaintiffs faced on the merits of their claims. I find that the objections to the settlement are without merit and should not and do not prevent approval of the settlement. The objecting parties were given ample opportunity to present and argue their objections. Therefore, pursuant to Federal Rule of Civil Procedure 23(e), I will approve the settlement of this antitrust class action suit.

Supreme Court, U.S.
FILED
JUN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF ARIZONA,
Petitioner,
v.
CHICAGO TITLE INSURANCE CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

In a plaintiff class action certified under Rule 23 (b)(1) and (b)(2), did the court of appeals properly affirm the district court's exercise of its discretion in approving a proposed settlement as fair, adequate and reasonable which did not permit class members to opt out?

LIST OF PARTIES

The parties to the proceedings below were the State of Arizona, Chicago Title Insurance Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, SAFECO Title Insurance Company, Stewart Title Guaranty Company, TICOR Title Insurance Company, William and Debbie Becker, Carl Bernstein, Terry Brandt, Anne L. Cunningham, Richard and Carol Hess, William R. McGee, Jr.,* Drew Milstein, Randal and Paula Pearson, David M. Pollick,* Dolores Sbroglia, and Weag Associates.

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* These individuals were omitted from the List of Parties in the Petition.

RULE 28.1 LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

CORPORATE RESPONDENTS

Respondent Chicago Title Insurance Company

Respondent Chicago Title Insurance Company is a wholly-owned subsidiary of Chicago Title and Trust Company, which is a wholly-owned subsidiary of Alleghany Corporation, a publicly-owned corporation.

Respondent First American Title Insurance Company

The parent company of respondent First American Title Insurance Company is The First American Financial Corporation.

Respondent Lawyers Title Insurance Corporation

The parent company of respondent Lawyers Title Insurance Corporation is Universal Leaf Tobacco Company, Incorporated, a publicly-owned corporation.

Respondent SAFECO Title Insurance Company

Respondent SAFECO Title Insurance Company is a wholly-owned subsidiary of Chicago Title and Trust Company, which is a wholly-owned subsidiary of Alleghany Corporation, a publicly-owned corporation.

Respondent Stewart Title Guaranty Company

The parent company of respondent Stewart Title Guaranty Company is Stewart Information Services Corporation. Other non wholly-owned subsidiaries or affiliates of Stewart Title Guaranty Company are listed in the Appendix hereto.

Respondent TICOR Title Insurance Company

Respondent TICOR Title Insurance Company is a wholly-owned subsidiary of TICOR Title Insurance Company of California, which is a wholly-owned subsidiary of TICOR. None of the outstanding common stock of TICOR is publicly traded. All of the outstanding preferred stock of TICOR is owned by New TC Holding Corporation, which is a wholly-owned subsidiary of Associated Madison Companies, Inc., which in turn is a wholly-owned subsidiary of Primerica.

Other Subsidiaries of Corporate Respondents

No subsidiary not listed herein of any corporate respondent which is not wholly owned has publicly-traded common stock.

OTHER RESPONDENTS

None of the remaining respondents is a corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
RULE 28.1 LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES	iii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
I. The issue before the Court	1
II. The class action claims	3
III. The decision below	5
ARGUMENT	7
I. There is no conflict among the courts of appeals as to whether an absent class member has an absolute, constitutional right to opt out of a judicially-approved settlement in a Rule 23(b)(1) or (b)(2) class action	7
II. The court of appeals' decision, affirming the district court's refusal to permit Arizona to opt out, does not conflict with this Court's decision in *Shutts*	12
III. A decision in favor of petitioner would destroy the settlement, thereby denying millions of people the benefits of the class action settlement that they now expect to receive	13
CONCLUSION	17

TABLE OF AUTHORITIES

CASES	Page
Ace Heating & Plumbing Co. v. *Crane Co.*, 453 F.2d 30 (3d Cir. 1971)	3
Air Line Stewards & Stewardesses Association v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974)	11
Arizona Downs v. *Arizona Horsemen's Foundation*, 130 Ariz. 550, 637 P.2d 1053 (1981)	17
Avagliano v. *Sumitomo Shoji America, Inc.*, 107 F.R.D. 748 (S.D.N.Y. 1985)	13
Bauman v. *United States District Court*, 557 F.2d 650 (9th Cir. 1977)	11
City of Detroit v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)	3, 8
Girsh v. *Jepson*, 521 F.2d 153 (3d Cir. 1975)	8
Grigsby v. *North Mississippi Medical Center, Inc.*, 586 F.2d 457 (5th Cir. 1978)	9
Grunin v. *International House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975)	8
Hansberry v. *Lee*, 311 U.S. 32 (1940)	8
Holmes v. *Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983)	9, 10
In re Jackson Lockdown/MCO, 107 F.R.D. 703 (E.D. Mich. 1985)	13
In re Real Estate Title and Settlement Services Antitrust Litigation, 1986-1 Trade Cas. (CCH) ¶ 67,149 (1986), *aff'd without op.*, 815 F.2d 695 (3d Cir. 1987)	2
In re TICOR Title Insurance Co., et al., FTC Dkt. No. 9190 (Dec. 22, 1986)	16
Keogh v. *Chicago and Northwestern Railway*, 260 U.S. 156 (1922)	5
LaChapelle v. *Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975)	9
Laskey v. *International Union, United Automotive Aerospace and Agricultural Implant Workers*, 638 F.2d 954 (6th Cir. 1981)	11

TABLE OF AUTHORITIES—Continued

Page

Moore v. *City of San Jose*, 615 F.2d 1265 (9th Cir. 1980) 3
Penson v. *Terminal Transport Co.*, 634 F.2d 989 (5th Cir. 1981) 9, 11
Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 12, 13, 18
Reynolds v. *National Football League*, 584 F.2d 280 (8th Cir. 1978) 3
Robertson v. *National Basketball Association*, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977) 11
Southern Motor Carriers Rate Conference v. *United States*, 471 U.S. 48 (1985) 5
Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 106 S.Ct. 1922 (1986) 5, 6
State v. *Arizona Licensed Beverage Association*, 128 Ariz. 515, 627 P.2d 666 (1981) 17
Turf Paradise, Inc. v. *Arizona Downs*, 670 F.2d 813 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982) 17
United States v. *United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1977) 9
Van Gemert v. *Boeing Co.*, 573 F.2d 733 (2d Cir.), *reh'g granted*, 590 F.2d 433 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980) 11
Walker v. *Styrex Industries*, 21 Fed. R. Serv. 2d (Callaghan) 355 (M.D.N.C. 1976) 11
Walsh v. *Great Atlantic & Pacific Tea Co.*, 726 F.2d 956 (3d Cir. 1983) 11
Wetzel v. *Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) 11
Women's Committee for Equal Employment Opportunity v. *National Broadcasting Co., Inc.*, 71 F.R.D. 666 (S.D.N.Y. 1976) 11

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES Page

Federal Trade Commission Act,
15 U.S.C. § 45(a)(1) (1982) 4, 16
McCarran-Ferguson Act,
15 U.S.C. §§ 1011 *et seq.* (1982) 4, 5
Sherman Act, 15 U.S.C. § 1 (1982) 4

FEDERAL RULES

Fed. R. Civ. P. 23 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF ARIZONA,

Petitioner,

v.

CHICAGO TITLE INSURANCE CO., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

I. The issue before the Court.

These consolidated class actions were certified under Rule 23(b)(1) and (b)(2). The district court exercised its discretion to approve a settlement which was contingent upon the resolution of all related claims without any opt outs. The district court did so only after carefully scrutinizing the terms of the settlement and balancing the benefits achieved against the likely consequences of litigation on the merits:

> My conclusion therefore is that, based on the relevant factors, the settlement negotiated by the parties in this case is reasonable, fair and adequate. The settlement was negotiated for the plaintiff class by competent counsel who observed their duty to pro-

> tect the interests of the entire class and who had the benefit of extensive discovery when evaluating the case. The settlement they worked out provides substantial benefits to the entire plaintiff class when considered in light of the almost insurmountable difficulties that the plaintiffs would have faced in obtaining any relief had they continued with this litigation. The complexity and expense of continued litigation only add to the legal difficulties plaintiffs faced on the merits of their claims. I find that the objections to the settlement are without merit and should not and do not prevent approval of the settlement.

In re Real Estate Title and Settlement Services Antitrust Litigation, 1986-1 Trade Cas. (CCH) ¶ 67,149 at 62,937 (1985), *aff'd without op.*, 815 F.2d 695 (3d Cir. 1987), reprinted in the Appendix to the Petition for Certiorari ("App. to Pet.") at 4a through 99a, 98a-99a.

The Court of Appeals for the Third Circuit refused to disturb the district court's finding and conclusions, affirming the district court's decision unanimously and summarily. The Attorney General of Arizona, nevertheless, asserts an absolute right to opt out of the class action on behalf of the State of Arizona.

The issue for this Court is whether the district court properly exercised its discretion in the circumstances of this litigation, and, thus, whether the court of appeal's decision affirming the district court was correct. Respondents believe that the district court's comprehensive and detailed opinion demonstrates that its exercise of discretion was proper. It is well-established that a reviewing court does not substitute its judgment for that of the district court with respect to approval of a class action settlement, but rather evaluates whether the district court abused its discretion:

> Such a determination is committed to the sound discretion of the trial judge. Great weight is accorded his views because he is exposed to the litigants, and

> their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.

Ace Heating & Plumbing Co. v. *Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971) (quoted with approval in *Reynolds* v. *National Football League*, 584 F.2d 280 (8th Cir. 1978); *see also City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 454-55 (2d Cir. 1974); *Moore* v. *City of San Jose*, 615 F.2d 1265, 1271 (9th Cir. 1980).

II. The class action claims.

Thirteen private antitrust class actions[1] were consolidated by the Judicial Panel on Multidistrict Litigation before Judge Donald W. VanArtsdalen of the United States District Court for the Eastern District of Pennsylvania. The complaints alleged that the six defendant

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[1] The private plaintiffs sought to represent a class defined, with minor variations among complaints, to include all persons and entities who had purchased title search and examination "services" and settlement "services" from the defendant title insurance underwriters in connection with real estate transactions in thirteen states, including Arizona. The plaintiffs contended that such "services" were not part of the business of insurance although the defendants performed these "services" in connection with issuing title insurance policies and the defendants considered these activities to be an integral part of the underwriting process.

The State of Arizona presumably is a member of the proposed plaintiff class by reason of its own purchases of such "services," although Arizona has never produced any evidence that it is a member of the class. The State of Arizona is not one of the named plaintiffs. No complaint defined a plaintiff class or subclass consisting solely of Arizona residents.

Before the district court and the court of appeals, Arizona purported to act as *parens patriae* on behalf of all Arizona residents who are members of the class, attempting to opt out on behalf of Arizona residents even though not one Arizona resident had objected to the settlement. It is unclear whether Arizona continues to maintain that position before this Court. Judge VanArtsdalen doubted the State's authority to do more than attempt to opt out on its own behalf. App. to Pet. at 27a-29a.

title insurance companies had violated Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), by participating in state-authorized rating bureaus which filed proposed rates with state insurance departments in thirteen states.[2] Each action sought to establish that the defendants could not legally file rates for title search and examination "services" and settlement "services" through state-authorized rating bureaus. The class actions were filed shortly after the Federal Trade Commission issued an administrative complaint under Section 5 of the F.T.C. Act, 15 U.S.C. § 45(a)(1) (1982), against the same title insurance companies concerning the same conduct.

The complaints sought both injunctive relief and treble damages. If the plaintiffs had pursued the claims to a successful conclusion on the merits, the district court would have had to craft injunctive relief affecting the manner in which defendants could participate in rating bureaus in the future, because the plaintiffs attacked as illegal only some, not all, rating bureau activities.[3] Indeed, injunctive relief might have been the only relief available to the class action plaintiffs even if they had been successful in establishing that defendants' conduct was illegal.[4]

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[2] The thirteen states were Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin, and Wyoming.

[3] For example, even the plaintiffs acknowledged that activities that constitute "the business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. § 1012b, are immune from attack under the federal antitrust laws to the extent that those activities are regulated under state law. Accordingly, even if the plaintiffs had been successful in proving every activity challenged was illegal, the defendants still would be able to participate in rating bureaus under some circumstances and file some rates jointly. The litigation could not be resolved simply by an injunction prohibiting the defendants from participating in rating bureaus.

[4] The defendants had contended from the beginning of the litigation that, even if the class action plaintiffs were successful, the

III. The decisions below.

Largely because of developments in the law adverse to the plaintiff class,[5] the class representatives and the de-

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plaintiffs could obtain only equitable relief because of the "filed tariff doctrine," which was first announced in *Keogh v. Chicago and N.W. Ry.*, 260 U.S. 156 (1922). Under this doctrine, the class action plaintiffs could recover no money damages because the rates which the plaintiffs claimed had become the lawful rates pursuant to the regulatory systems enacted by the thirteen states.

In *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 106 S.Ct. 1922 (1986), this Court reaffirmed the "filed tariff doctrine." The district court considered the potential applicability of the doctrine to this case in its decision. App. to Pet. at 76a-77a.

[5] Initially the class action plaintiffs contended that the defendants' participation in rating bureaus and the joint filing of rates for approval by state regulators would be activities protected under the "state action" doctrine only if state law "compelled" the conduct in issue. Shortly after the litigation commenced, however, this Court decided *Southern Motor Carriers Rate Conf.* v. *United States*, 471 U.S. 48 (1985), holding that it was not necessary for a private party to prove that its conduct was "compelled" by a state in order to establish "state action" immunity. In reaction to this decision, the parties engaged in discovery relating to the issue of active state supervision and began settlement negotiations. The district court recorded in detail these events in its opinion, App. to Pet. at 7a-18a, and extensively analyzed the results of discovery on the "state action" issue, App. to Pet. at 63a-73a, because it considered this Court's decision in *Southern Motor Carriers* on the state action doctrine to be "possibly dispositive" of the class action litigation, App. to Pet. at 10a.

However, *Southern Motor Carriers* was not the only basis for the district court's decision approving the settlement. The district court also discussed the possibility that all the activities in issue were immune from the antitrust laws by virtue of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982), which exempts the business of insurance from antitrust attack, App. to Pet. at 7a, 73a-75a, concluding:

> [T]he McCarran-Ferguson Act also poses a very significant if not insurmountable obstacle to the establishment of liability against the defendants.

App. to Pet. at 75a. The district court considered as well the possibility that the plaintiffs could never recover monetary damages

fendants agreed to a proposed settlement and submitted it to the district court in January of 1986. The agreement provided that the settlement would become effective only if the district court certified a plaintiff class consisting of *all* members of the class under Rule 23(b)(1) and/or Rule 23(b)(2).[6] After six months of review, notice by publication, and a hearing on objections, Judge VanArtsdalen entered a decision certifying a settlement class under Rule 23(b)(1)(a) and (b)(2) and approving the settlement. In doing so, the district court concluded that the settlement "provides substantial benefits to the entire plaintiff class when considered in light of the almost insurmountable difficulties that the plaintiffs would have faced in obtaining any relief had they continued with this litigation." App. to Pet. at 98a-99a.

No resident of Arizona filed an objection to the settlement. Nor did the State of Arizona file an objection. Instead, the Arizona Attorney General ignored the procedures set forth by the district court for objections to be made and simply attempted to opt out. The Attorney General was the only member of the plaintiff class, estimated to number more than 3,400,000 persons, who attempted to opt out of the settlement negotiated by counsel for the class.[7] The Arizona Attorney General also

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because of the "filed tariff doctrine," App. to Pet. at 8a, 76a-77a (citing this Court's recent decision in *Square D*). *See infra* note 6.

[6] This provision was premised, in part, on virtually insurmountable obstacles to providing individual notice to each and every class member under Rule 23(b)(3), as explained in depth in the district court's decision. *See* App. to Pet. at 49a-52a. Such a requirement would have ruled out all possibility of settlement and required a full trial. The district court noted that, in all likelihood, the result would have been that class members received no benefits at all. *Id.*

[7] Approximately 600 members of the class responded to the notice by inquiring about the settlement, including 65 residents of Arizona. Only 20 individuals then filed objections to the settlement, none of whom was an Arizona resident. The attorneys general of

was the only class member to pursue an appeal of the district court's decision.[8]

By a March 3, 1987, Judgment Order, the Court of Appeals for the Third Circuit affirmed the district court's decision. The appellate court issued no opinion; apparently it concluded that the district court had exercised its discretion appropriately and had applied the proper legal standards. The Arizona Attorney General is the only member of the class who requests this Court's review of the Third Circuit's decision.

ARGUMENT

I. There is no conflict among the courts of appeals as to whether an absent class member has an absolute, constitutional right to opt out of a judicially-approved settlement in a Rule 23(b)(1) or (b)(2) class action.

The district court certified the class under Rule 23 (b) (1) because there was a serious risk that multiple lawsuits would lead to inconsistent obligations concerning defendants' rating bureau activities. App. to Pet. at 40a-42a. The district court also certified the class under Rule 23(b)(2) because the plaintiffs sought injunctive relief that would provide a remedy for the class as a whole and that became the primary, and perhaps exclusive, relief available to the plaintiff class. App. to Pet.

Montana, New Jersey, Ohio, Pennsylvania, and Wisconsin filed the only other objection in the form of a joint memorandum in opposition to the proposed settlement. The Arizona Attorney General did not join in their memorandum, but rather filed a one-sentence request to opt out. The Arizona Attorney General later served the respondents with a three-page memorandum asserting a constitutional right to opt out, but it is not clear that this memorandum was ever filed with the district court. At no time before the district court did Arizona challenge the fairness of the settlement or the adequacy of representation.

[8] The Attorney General of Ohio initially filed a notice of appeal in the Third Circuit but later withdrew it.

at 43a-47a, 52a. After addressing every objection presented either in writing or at the hearing on the settlement, the district court found that the named plaintiffs had fairly and adequately protected the interests of the class and that the settlement was fair, adequate and reasonable. App. to Pet. at 52a-99a.

Given the circumstances of the settlement, which was contingent upon the final resolution of all related claims by class members, and given the strong public policy in favor of settlement of class actions, Judge VanArtsdalen exercised his discretion to approve the settlement, thereby denying the Attorney General of Arizona's request to opt out. The State Attorney General nevertheless claims a constitutional, due process right to opt out of this class action.

Over 45 years ago this Court announced the standard for judging whether absent members of a class have been accorded due process, stating:

> [T]his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.

Hansberry v. *Lee*, 311 U.S. 32, 42 (1940). It is abundantly clear in this case that the district court adopted a procedure that well-protected absent class members. It included notice and opportunity to object in writing and at a hearing, as well as a determination that the class was adequately represented. Moreover, the district court scrutinized the settlement, applying the appropriate legal standards set forth in cases such as *Girsh* v. *Jepson*, 521 F.2d 153, 156-57 (3d Cir. 1975), *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974); and *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 124 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

Arizona asserts, nevertheless, that there is a conflict among the courts of appeals as to whether absent class members have an absolute due process right to opt out of any class action seeking monetary damages. In making this argument, Arizona erroneously relies upon *Holmes* v. *Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), where the court of appeals reversed a district court order approving settlement of a Title VII antidiscrimination suit and denying requests to opt out. Neither the result nor the reasoning in *Holmes* are in conflict with the Third Circuit's decision, however.

In *Holmes*, the court of appeals explicitly rejected the argument that an opportunity to opt out must be provided as a due process right:

> The general rule in this circuit remains that absent members of (b)(2) classes have no automatic right to opt out of the lawsuit and to prosecute an entirely separate action. *See Penson* [v. *Terminal Transport Co.*], 634 F.2d [989] at 993 [(5th Cir. 1981)]; *Grigsby* v. *North Mississippi Medical Center, Inc.*, 586 F.2d 457, 461 (5th Cir. 1978); *LaChapelle* v. *Owens-Illinois, Inc.*, 513 F.2d 286, 288 n.7 (5th Cir. 1975); *United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1057 (5th Cir. 1975), *cert. denied*, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1977).

706 F.2d at 1153. The court of appeals in *Holmes* simply reaffirmed the rule in that circuit that a decision to provide an opt out right to (b)(2) class members asserting monetary claims is a matter for the discretion of the district court, to be disturbed only for abuse of discretion. *Id.* at 1154-55. The court of appeals specifically stated that its decision was *not* based on due process grounds. *Id.* at 1160.

Furthermore, the result in *Holmes* depended upon a key factor not present in this case. The class representatives had negotiated a settlement in which they benefited

more than the absent members of the class whom they were representing. The Eleventh Circuit concluded that the settlement was not fair, adequate and reasonable because the named plaintiffs had arranged to take half of the total settlement fund and thus did not represent or protect the interests of the class as a whole. *Id.* at 1159-60. This conclusion compelled the appellate court to decide, in that context, that absent class members should have been permitted to opt out. *Id.* at 1155.

This litigation is completely different. In this case the class representatives will receive exactly the same benefits as every other member of the class under the settlement approved by the district court. Arizona may disagree with the other members of the class and with the district court about the value of the settlement and the risks and costs of further litigation. But that difference of opinion over the cost-benefit analysis of the settlement does not give rise to a conflict of interest between the class representatives and absent class members of the type that concerned the *Holmes* court.

Arizona has simply ignored the Eleventh Circuit's own words in *Holmes*:

> A back pay class in which all members are affected equally by a settlement would, of course, be sufficiently homogeneous to obviate any need for an opt out protection.

706 F.2d at 1158. Because all members of the plaintiff class in this litigation will receive the same benefits under the settlement, the reasons applied by the Eleventh Circuit in *Holmes* would not apply in this case.

Arizona also attempts to derive significance from the fact that some lower courts have denied any opt outs in class actions certified under Rule 23(b)(1) or (b)(2), while other courts of appeals, such as the *Holmes* court, have held that they have discretion to permit class mem-

bers to opt out of particular Rule 23(b)(1) or (b)(2) class actions. Arizona misses the point. Not one of the authorities cited by the Arizona Attorney General stands for the proposition that he asserts is in conflict with the Third Circuit's decision in this case—that there is an absolute right to opt out of a Rule 23(b)(1) or (b)(2) class.[9] Indeed, the courts of appeals have repeatedly denied requests to opt out of class actions certified under Rule 23(b)(1) or (b)(2), even if a claim for money damages is made in addition to claims for equitable relief.[10]

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[9] *See Penson* v. *Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981) (no right to opt out of (b)(2) class even where some monetary relief was involved); *Laskey* v. *Internat'l Union, United Auto., Aero. and Agri. Implant Workers*, 638 F.2d 954, 956 (6th Cir. 1981) (where a class claim could have been certified under (b)(2) or (b)(3) and the court certified a (b)(2) class, there was no right to opt out); *Bauman* v. *United States District Court*, 557 F.2d 650, 659-70 (9th Cir. 1977) (no right to opt out of a (b)(2) class, so no writ of mandamus would issue to compel district court to permit opt out); *Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) (no right to opt out of (b)(2) class even after the dominant relief was no longer injunctive but monetary); *Air Line Stewards & Stewardesses Assoc.* v. *American Airlines, Inc.*, 490 F.2d 636, 642 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974) (no right to opt out of a (b)(2) class); *Walker* v. *Styrex Industries*, 21 Fed. R. Serv. 2d (Callaghan) 355, 358 (M.D.N.C. 1976) (court certified class and exercised discretion to order notice under provision applicable to (b)(3) class actions); *Women's Comm. for Equal Empl. Opp.* v. *National Broadcasting Co., Inc.*, 71 F.R.D. 666, 671, (S.D.N.Y. 1976) (court said notice in a (b)(2) action is discretionary and ordered notice permitting class members to opt out).

[10] *See, e.g., Walsh* v. *Great Atl. & Pac. Tea Co.*, 726 F.2d 956 (3d Cir. 1983) (due process is satisfied in a (b)(1) or (b)(2) case if the class is adequately represented and there is no right to opt out); *Van Gemert* v. *Boeing Co.*, 573 F.2d 733 (2d Cir.), *reh'g granted*, 590 F.2d 433 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980) (members of plaintiff class certified under (b)(1) or (b)(2) had no right to opt out); *Robertson* v. *National Basketball Assoc.*,

II. The court of appeals' decision, affirming the district court's refusal to permit Arizona to opt out, does not conflict with this Court's decision in *Shutts*.

The Arizona Attorney General attempts to manufacture a reason for this Court to grant certiorari by arguing that the Third Circuit's decision conflicts with the Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). He is mistaken. There is no conflict.

Shutts was a plaintiff class action under the Kansas equivalent of Rule 23(b)(3) in which *only* a claim for damages was involved. The merits of the case concerned whether Phillips Petroleum owed approximately 28,000 identified members of the plaintiff class interest on royalty payments that Phillips had withheld for several years. The petitioner in *Shutts* asserted that Kansas lacked personal jurisdiction over class members not resident in Kansas and argued that Kansas could only acquire jurisdiction by using an "opt in" procedure (by which a class members would affirmatively elect to participate in the class). The Kansas court had permitted class members to opt out. This Court held that the "opt out" procedure which was used satisfied due process and was sufficient to give the Kansas court jurisdiction. Due process did not require an "opt in" procedure.

Thus, for many reasons the decision in *Shutts* does not stand for the proposition for which Arizona cites it. *Shutts*, unlike this case, involved a class certified under the state equivalent of Rule 23(b)(3). *Shutts*, unlike this case, involved only monetary relief. In *Shutts*, unlike this case, the lower court had permitted class members to opt out. For that reason the Court was not presented with the issue whether a refusal to permit someone to opt out was a denial of due process.

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389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682, 685-86 (2d Cir. 1977) (settlement of antitrust class action certified under Rule 23(b)(1) without permitting opt outs was appropriate).

This Court did not consider, much less decide, whether the Constitution requires that class members be allowed to opt out of a Rule 23(b)(1) or (b)(2) class action in circumstances such as the case at hand. Rather, it limited the scope of its decision to class actions wholly or predominantly for money damages, which, by definition, are certified under Rule 23(b)(3) and are different from Rule 23(b)(1) and (b)(2) class actions:

> Our holding today is *limited* to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class action lawsuits, such as those seeking equitable relief.

Shutts, 472 U.S. at 811 n.3 (emphasis added).[11] Thus, the Third Circuit's decision does not conflict with *Shutts*, and there is no authority for transforming all (b)(1) and (b)(2) class actions into (b)(3) actions by insisting that there is an absolute right to opt out if money damages are sought in the complaint as well as equitable relief.

III. A decision in favor of petitioner would destroy the settlement, thereby denying millions of people the benefits of the class action settlement that they now expect to receive.

The Arizona Attorney General argues that this Court should grant certiorari because the decisions of the courts below "Adversely Affect A Substantial Number

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[11] *Accord, Avagliano* v. *Sumitomo Shoji America, Inc.*, 107 F.R.D. 748, 749 (S.D.N.Y. 1985) (plaintiff class action seeking both injunctive and monetary relief in which the court refused to let class members opt out and said: "where a class has been certified under (b)(2), there is no requirement that notice and the right to opt out be given to class members."); *In re Jackson Lockdown/MCO*, 107 F.R.D. 703, 713 (E.D. Mich. 1985) (plaintiff class action in which the class sought both injunctive relief and damages and court certified as a mandatory class action without permission to opt out).

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No.

Supreme Court, U.S.
FILED
JUN 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

STATE OF ARIZONA,

PETITIONER,

vs.

CHICAGO TITLE INSURANCE CO., ET AL.,

RESPONDENTS.

Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Third Circuit

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June 1, 1987

QUESTIONS PRESENTED

1. Do absent plaintiffs in a class action for damages have a due process right to opt out of an inadequate class settlement, thereby preserving their right to file their own action, prior to entry of a judgment in the class action extinguishing their individual damage claims?

2. Does Rule 23, Fed. R. Civ. P., permit absent plaintiffs to opt out of a non-cohesive class action for damages that is certified under Rule 23(b)(1) or (b)(2)?

LIST OF PARTIES

The parties to the proceedings below were the State of Arizona, Chicago Title Insurance Co., First American Title Insurance Co., Lawyers Title Insurance Corp., SAFECO Title Insurance Co., Stewart Title Guaranty Co., Ticor Title Insurance Co., William and Debbie Becker, Carl Bernstein, Terry Brandt, Anne L. Cunningham, Richard and Carol Hess, Drew Milstein, Randal and Paula Pearson, Dolores Sboglia, and Weag Associates.

TABLE OF CONTENTS

Page

Questions Presented i

List Of Parties ii

Table Of Contents iii

Table Of Authorities v

Opinions Below 2

Constitutional And Statutory Provisions Involved 3

Statement Of The Case 4

Reasons For Granting The Writ 10

I. The Third Circuit's Denial Of Opt Outs In A Class Action For Damages Conflicts With A Decision Of This Court 10

II. The Decisions Of The District Court And The Third Circuit Conflict With The Opinion Of Another Court Of Appeals 13

III. The Decisions Of The Courts Below Adversely Affect A Substantial Number Of Consumers 18

TABLE OF CONTENTS (cont'd)

Page

Conclusion 20

Appendix 1a

Judgment Order Of The United States Court Of Appeals For The Third Circuit 2a

Memorandum Opinion And Order Of The United States District Court For The Eastern District Of Pennsylvania 4a

TABLE OF AUTHORITIES

Cases: Page

Airline Stewards & Stewardesses Ass'n v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974) 17

Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977) 17

Bogosian v. Gulf Oil Corp., 62 F.R.D. 124 (E.D. Pa. 1973), vacated, 561 F.2d 434 (3d Cir. 1977) 12

Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) 12

Fertig v. Blue Cross of Iowa, 68 F.R.D. 53 (N.D. Iowa 1974) 13

Holmes v. Continental Can Company, 706 F.2d 1144 (11th Cir. 1983) 14, 15

In re Sugar Industry Antitrust Litigation, 73 F.R.D. 322 (E.D. Pa. 1976) 12

TABLE OF AUTHORITIES (cont'd)

Cases: Page

Laskey v. Int'l Union, United Automotive, Aerospace and Agricultural Implement Workers, 638 F.2d 954 (6th Cir. 1981) 17

Marks v. San Francisco Real Estate Board, 69 F.R.D. 353 (N.D. Calif. 1975) 12

Penson v. Terminal Transport Co., 634 F.2d 989 (5th Cir. 1981) 17

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 10, 11, 13

Sommers v. Abraham Lincoln Federal Savings & Loan Ass'n, 66 F.R.D. 581 (E.D. Pa. 1975), appeal dismissed, 549 F.2d 643 (3d Cir. 1977) 12

Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) 6

Walker v. Styrex Industries, 21 Fed. R. Serv.2d (Callaghan) 355 (M.D.N.C. 1976) 17

TABLE OF AUTHORITIES (cont'd)

Cases: Page

Walsh v. Great Atlantic & Pacific Tea Co., Inc., 726 F.2d 956 (3d Cir. 1983) 8, 13

Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir.), cert. denied, 421 U.S. 1011 (1975) 17

Women's Committee for Equal Employment Opportunity v. National Broadcasting Co., 71 F.R.D. 666 (S.D.N.Y. 1976) 17

Statutes and Rules:

15 U.S.C. § 1 5

15 U.S.C. § 15 . . . . . .5, 12

15 U.S.C. § 26 . . . . . .5, 12

15 U.S.C. § 45 4

28 U.S.C. § 1254 2

28 U.S.C. § 1337 5

Ariz. Rev. Stat. Ann. § 44-1408 (Supp. 1986) 15

Fed. R. Civ. P. 23 . . . . . Passim

TABLE OF AUTHORITIES (cont'd)

Other Authorities:

Ariz. Dept. of Ins.
Ann. Rep. 19

Conn. Ann. Rep. of
the Ins. Comm. 19

Wisc. Ins. Rep. 19

IN THE SUPREME COURT

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vs.

CHICAGO TITLE INSURANCE CO., ET AL.,

RESPONDENTS.

Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Third Circuit

The State of Arizona respectfully prays that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered on March 3, 1987.

OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit is reported at 815 F.2d 696 (Table), and it is reprinted in the Appendix, p. 2a.

The memorandum opinion and order of the United States District Court for the Eastern District of Pennsylvania is reported in 1986-1 Trade Cas. (CCH) ¶ 67,149. It is reprinted in the Appendix, p. 4a.

JURISDICTION

The judgment order of the United States Court of Appeals for the Third Circuit was filed on March 3, 1987. The State of Arizona did not petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law ....

Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other

members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

STATEMENT OF THE CASE

On January 7, 1985, the Federal Trade Commission filed a complaint against the six title insurance companies involved here. The complaint alleged that the title insurance companies violated section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by fixing prices for real estate title search services in thirteen

states. The title insurance companies allegedly accomplished their price fixing by engaging in collective rate making through title insurance rating bureaus in the various states.

Shortly after the FTC filed its complaint, class actions were filed against the same title insurance companies, alleging that the defendants' price fixing activities in the thirteen states violated section 1 of the Sherman Act, 15 U.S.C. § 1.[1/] All the complaints were filed by private plaintiffs, not by the State of Arizona or any other state. The class actions, which were consolidated in the Eastern District of Pennsylvania, sought injunctive relief and treble damages on

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[1/] The bases for jurisdiction in the district court were 28 U.S.C. § 1337 and sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

behalf of consumers, including governmental entities, who purchased title search services at fixed prices from the title insurance companies in thirteen states. The title insurance companies estimated that the size of the class was approximately 3.4 million to 4.3 million consumers.

Within two months after the filing of the FTC action and the private class actions, this Court decided Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985), which dealt with the state action immunity doctrine. In response to Southern Motor Carriers, the FTC dropped its claims against the title insurance companies for their collective rate making activities in several states, but it proceeded to trial on its claims against the defendants for their price fixing in several other states, including Arizona, Connecticut, and Wisconsin.

The class representatives in the class actions thought that Southern Motor Carriers had an adverse effect on their claims, and they began negotiating a settlement. The parties reached a settlement that provided for a limited injunction and a small amount of additional title insurance for a limited number of consumers in the class. The settlement also provided for $715,000 to the counsel for the class representatives. The vast majority of the class members, however, were to receive nothing under the settlement.

For purposes of approving the settlement, the district court certified the consumer class under Rule 23(b)(1)(A) and (b)(2), Fed. R. Civ. P., and ordered that the class receive notice by publication. The attorneys general of seven states filed an objection to the settlement, arguing that the settlement provided

substantial relief only to the counsel for the class representatives but no real relief to the consumer class. In addition, the State of Arizona sought to opt out of the settlement on its own behalf and as parens patriae on behalf of the residents of the state. Relying on Walsh v. Great Atlantic & Pacific Tea Co., Inc., 726 F.2d 956, 963 n.3 (3d Cir. 1983), the district court ruled that because the class was certified under (b)(1) and (b)(2), rather than (b)(3), no one would have the opportunity to opt out. The district court also overruled the objection raised by the seven attorneys general, and entered a judgment extinguishing the damage claims of all class members.

On appeal, the State of Arizona argued that due process is violated if individual damage claims are foreclosed without class members having the opportunity to exclude

themselves from a class action settlement. In addition, Arizona pointed out that Southern Motor Carriers has no impact at all on damage claims arising under state antitrust laws; Southern Motor Carriers and the state action immunity doctrine only apply to antitrust actions based on federal law. Nonetheless, the class action judgment foreclosed consumers even from seeking damages under state laws. Arizona argued that under state antitrust law, consumers in the state have viable claims for damages against the title insurance companies.

While the appeal was pending, the administrative law judge of the FTC ruled on December 22, 1986, that the collective rate making of the title insurance companies violated federal law in Connecticut and Wisconsin. The effect of the FTC's decision was to emphasize that consumers in Connecticut and Wisconsin had damage

claims against the title insurance companies based on federal antitrust law. In summary, even though consumers in Connecticut and Wisconsin had strong claims for damages under federal antitrust law, and even though consumers in other states, such as Arizona, had damage claims under state antitrust law, the Third Circuit affirmed without opinion the district court's decision not to permit opt outs. All viable damage claims were extinguished.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Denial Of Opt Outs In A Class Action For Damages Conflicts With A Decision Of This Court

In Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), the Court considered the minimal procedural due process protections that must be afforded to absent plaintiffs in class actions involving

claims for damages. The Court's holding is contained in the following paragraph:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel .... The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

472 U.S. at 811-12 (emphasis added). In a footnote, the Court stressed that the holding applied "to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." 472 U.S. at 811 n.3.

Shutts clearly holds that if a class action seeks to bind class members

concerning their individual claims for damages, due process requires that the class members be provided with an opportunity to opt out.

The class actions here sought treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, and injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26. Because the class actions included claims for treble damages under section 4 of the Clayton Act, the damage claims are not secondary or ancillary to the claim for an injunction. See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968); Bogosian v. Gulf Oil Corp., 62 F.R.D. 124, 134 (E.D. Pa. 1973), vacated, 561 F.2d 434 (3d Cir. 1977); In re Sugar Industry Antitrust Litigation, 73 F.R.D. 322, 342 (E.D. Pa. 1976); Marks v. San Francisco Real Estate Board, 69 F.R.D. 353, 358 (N.D. Calif. 1975); Sommers v.

Abraham Lincoln Federal Savings & Loan Ass'n, 66 F.R.D. 581, 589-90 (E.D. Pa. 1975), appeal dismissed, 549 F.2d 643 (3d Cir. 1977); Fertig v. Blue Cross of Iowa, 68 F.R.D. 53, 59 (N.D. Iowa 1974). The claims for treble damages plainly mean that this class action is one "which seek[s] to bind known plaintiffs concerning claims wholly or predominately for money judgments." Shutts, 472 U.S. at 811 n.3. The holding of Shutts, therefore, should have applied.

The Third Circuit ignored the Shutts holding and refused to permit opt outs in a case in which due process required opt outs.

II. The Decisions Of The District Court And The Third Circuit Conflict With The Opinion Of Another Court Of Appeals

Relying on Walsh v. Great Atlantic & Pacific Tea Co., Inc., 726 F.2d 956, 963

n.3 (3d Cir. 1983), the district court in this case ruled that because the class was certified under (b)(1) and (b)(2), opt outs were not permitted. In other words, the district court held that Rule 23 itself does permit or require opt outs unless the class is certified under (b)(3). This decision is inconsistent with the rule adopted by the Eleventh Circuit in Holmes v. Continental Can Company, 706 F.2d 1144 (11th Cir. 1983).

Holmes involved an approval of a settlement in a Title VII class action for back pay. The district court certified the class under Rule 23(b)(2) and refused to permit opt outs even though the strength and viability of the back pay claims of the class varied from one class member to another. The class simply was not cohesive. On appeal, the Eleventh Circuit held that because the back pay class was not homogeneous, the opt out

protection of (b)(3) must be applied even though the class was not certified under (b)(3). The court based its decision on the "federal class action rule rather than on the mandates of the due process clause." 706 F.2d at 1160.

As in Holmes, the viability of the damage claims of the class members here is not uniform from one class member to another. The class is not cohesive. The class members in Connecticut and Wisconsin have viable treble damage claims based on the federal antitrust laws. Class members in Arizona may not have treble damage claims based on federal antitrust law, but they have claims for actual or single damages based on state antitrust law.[2/]

[2/] Under Ariz. Rev. Stat. Ann. § 44-1408(B) (Supp. 1986), the trebling of damages in an antitrust action is not automatic as it is under section 4 of the Clayton Act.

Class members in other states may not have damage claims based on either federal or state law. Although the viability of the damage claim thus varies from class member to class member, making the class non-cohesive, the district court and Third Circuit denied opt outs because the class was certified under (b)(1) and (b)(2). If the same case had been before the Eleventh Circuit, opt outs would have been permitted even though the class was certified under (b)(1) and (b)(2). The decision of the district court and Third Circuit directly conflicts with the rule adopted by the Eleventh Circuit. The conflict between the circuits merits the grant of certiorari.

Moreover, the lower courts are generally split on the issue of whether opting out is permissible in classes that are not certified under (b)(3). Some courts permit

opt outs in such classes. See Penson v. Terminal Transport Co., 634 F.2d 989, 993 (5th Cir. 1981); Bauman v. United States District Court, 557 F.2d 650, 659-60 (9th Cir. 1977); Walker v. Styrex Industries, 21 Fed. R. Serv.2d (Callaghan) 355 (M.D.N.C. 1976); Women's Committee for Equal Employment Opportunity v. National Broadcasting Co., 71 F.R.D. 666, 671 (S.D.N.Y. 1976). Conversely, other courts do not permit opt outs. See Laskey v. Int'l Union, United Automotive, Aerospace and Agricultural Implement Workers, 638 F.2d 954, 956 (6th Cir. 1981); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 252-53 (3d Cir.), cert. denied, 421 U.S. 1011 (1975); Airline Stewards & Stewardesses Ass'n v. American Airlines, Inc., 490 F.2d 636, 642 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974).

Lower courts need guidance from the Supreme Court on the type of (b)(1) and (b)(2) actions requiring opt outs.

III. The Decisions Of The Courts Below Adversely Affect A Substantial Number Of Consumers

In the proceedings before the district court, the title insurance companies estimated that the class consisted of approximately 3.4 million to 4.3 million consumers in all thirteen states affected by their collective rate making.[1/] If the assumption is made that only consumers in Arizona, Connecticut, and Wisconsin have viable claims for damages, then the size

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[1/] The title insurance companies determined the class size by first calculating the nationwide number of homesales from 1981 through 1985, and then multiplying that nationwide total by the ratio of the population in the thirteen states to the national population.

of the class is reduced to approximately 700,000 to 900,000 consumers. At a minimum, the district court and Third Circuit foreclosed the damage claims of 700,000 consumers in three states without any consumer being able to opt out and preserve his right to seek damages.

For the years 1981 to 1985, the insurance companies in Arizona collected $137 million for title search services. Ariz. Dept. of Ins. Ann. Rep., 1981 to 1985. In Connecticut, the title insurance companies were paid $103 million for title search services during 1981 to 1985. Conn. Ann. Rep. of the Ins. Comm., 1981 to 1985. In Wisconsin, the companies received $76 million for the same time period. Wisc. Ins. Rep., 1981 to 1985. Thus, in Arizona, Connecticut, and Wisconsin, consumers paid the title insurance companies a total of $316 million for title search services

during 1981 to 1985. Even if the overcharges generated by the title insurance companies' price fixing were as low as one percent, then the total, untrebled amount of damages sustained by consumers would be more than $3 million. If, as is more likely, the overcharges were higher than one percent, say ten percent, then consumers in the three states have sustained damages of more than $30 million.

Not only do the decisions of the district court and Third Circuit adversely affect a large number of consumers, the decisions also have a substantial impact on those consumers in monetary terms.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-0450

IN RE:

REAL ESTATE TITLE AND SETTLEMENT SERVICES ANTITRUST LITIGATION

State of Arizona,

Appellant

Appeal from the United States District Court For the Eastern District of Pennsylvania
(Civil Action No. 633)
District Judge: Honorable Donald W. VanArtsdalen

Argued February 11, 1987

BEFORE: HIGGINBOTHAM and STAPLETON, Circuit Judges and Rodriguez, District Judge*

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* Honorable Joseph H. Rodriguez, United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the district court's Final Order and Judgment of June 10, 1986 be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

_____
Circuit Judge

ATTEST:

_____
Clerk

DATED: March 3, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN REAL ESTATE TITLE	:	MDL DOCKET NO. 633
and SETTLEMENT	:	ALL CASES
SERVICES ANTITRUST	:	
LITIGATION	:	

MEMORANDUM OPINION AND ORDER

VanARTSDALEN, J. June 10, 1986

This action, MDL No. 633, results from twelve separate antitrust class actions which were originally filed in the United States District Courts in the Eastern and Middle Districts of Pennsylvania, the Southern District of New York, the Central District of California and the District of Oregon. The twelve actions were consolidated and transferred, where necessary, to this court by the Judicial Panel on Multidistrict Litigation in orders dated March 20, 1985, April 19, 1985 and May 8, 1985,

pursuant to 28 U.S.C. § 1407.[1]

The plaintiffs allege that the six defendant title insurance companies (defendants), Chicago Title Insurance Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, Safeco Title Insurance Company, Stewart Title Guaranty Company and Ticor Title Insurance Company, combined and conspired in violation of the federal antitrust laws to fix prices for title search and examination services and for settlement services in thirteen states: Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New

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1. Three of the original twelve plaintiffs, Public Storage, Inc., 159-161 Stanton Street Realty Corp. and Bernard Koch, have stipulated that their claims be dismissed without prejudice. See Stipulation and Order dated June 14, 1985 (dismissing Public Storage, Inc.); Stipulation and Order dated August 13, 1985 (dismissing 159-161 Stanton Street Realty Corp.); and Order dated May 15, 1985 (dismissing Bernard Koch).

Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming (the affected states). The plaintiffs allege that defendants accomplished this combination and conspiracy through membership in state-authorized rating bureaus, which submitted prices for title search and settlement services for approval by the insurance departments in each of the thirteen affected states. The filing of the civil actions followed the initiation of an enforcement proceeding against the six defendants by the Federal Trade Commission (FTC), alleging substantially similar conduct and involving the same thirteen states.[2]

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2. After the Supreme Court's decision in Southern Motor Carriers Rate Conference, Inc. v. United States, ____ U.S. ____, 105 S. Ct. 1721 (1985), the FTC dropped its claims against the six defendants arising from their conduct in Louisiana, New Mexico, New York, Oregon and Wyoming. The FTC significantly reduced the scope of its action against the six defendants in Pennsylvania and New

The defendants, in their answers to the individual complaints, denied liability and denied that plaintiffs or any members of the proposed class had suffered any damages. The defendants also raised numerous, affirmative defenses to the complaints. In particular the defendants have consistently contended that they were protected against antitrust liability for their rating bureau activities by virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1011-15, which exempts the business of insurance from the coverage of the antitrust laws, and the state action doctrine, which in general prevents the imposition of antitrust liability for activities conducted pursuant to state law. The defendants

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Footnote 2 continued

Jersey. The FTC has maintained its action against the six defendants in Arizona, Connecticut, Montana, Idaho, Ohio and Wisconsin.

also contend that under the filed-tariff doctrine, plaintiffs and the members of the proposed class were not entitled to damages.

On March 27, 1985, the same day that the Judicial Panel on Multidistrict Litigation's first order transferring and consolidating the individual cases as MDL-633 was filed in this court, the United States Supreme Court decided Southern Motor Carriers Rate Conference, Inc. v. United States, ____ U.S. ____, 105 S. Ct. 1721 (1985), which substantially redefined the principles governing the state action doctrine as applied to state authorized rating bureau activities. The Supreme Court in Southern Motor Carriers held that the state action defense to antitrust liability for rating bureau activity is established if (1) the state has a clearly articulated and affirmatively expressed policy permitting

defendants' challenged conduct; and (2) the state actively supervises such conduct. The Southern Motor Carriers decision extended the state action doctrine to situations where the collective rate making conduct was permitted but not compelled by state law. The plaintiffs and their counsel could not reasonably have foreseen the Supreme Court's Southern Motor Carriers decision at the time they commenced this litigation or the severe negative impact it would have on their claims. As noted, after the Southern Motor Carriers decision, the FTC dropped its claims against the defendants for their rating bureau activities in the states of Louisiana, New Mexico, New York, Oregon and Wyoming and greatly limited the scope of the action against defendants in New Jersey and Pennsylvania. In the remaining six states, Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin,

the FTC is apparently arguing that the state action doctrine does not apply to defendants rating bureau activities because the FTC contends those states did not actively supervise the activity. Memorandum of Defendants Addressing Objections to Proposed Settlement Agreement, April 8, 1986 (Defendants' Memorandum), p.5.

Because of what I then viewed, and still view, as the possibly dispositive effect of the Southern Motor Carriers decision on this litigation, on May 20, 1985 I ordered that proceedings in this matter be limited to discovery on the narrow issue of whether the state action doctrine as set out in Southern Motor Carriers defeated plaintiffs' claims. Memorandum Opinion and Order No. 1 (Order No. 1), dated May 20, 1985, ¶¶ 16-17. I further ordered that discovery on the state action defense was to be completed

by October 1, 1985, and defendants were permitted to file a joint consolidated motion for summary judgment on the state action doctrine on or before October 10, 1985. Id. at ¶¶ 3, 17. I specifically ordered plaintiffs not to file a motion for class certification until after disposition of the joint motion for summary judgment, Id. at ¶ 18. The May 20, 1985 order also established the procedures to be followed in the multi-district litigation and appointed Allen D. Black, Esquire, of Fine, Kaplan and Black, as liaison counsel for plaintiffs and Peter Hearn, Esquire, of Pepper, Hamilton and Scheetz, as liaison counsel for defendants. Id. at ¶¶ 6-7.

It was, and still is, my understanding that all of the thirteen affected states have statutes which explicitly permit collective rate-making, thus satisfying the first prong of the state action

doctrine. Order No. 1 at p.4. As the result of my May 20, 1985 Memorandum Opinion and Order, the plaintiffs engaged in extensive discovery, particularly focusing on whether the affected states actively supervised the defendants' rate-making activities, the second prong of the state action doctrine. Affidavit of Allen D. Black, Esq., Relating to Plaintiffs' State Action Discovery Efforts (Black Affidavit re State Action Discovery), ¶ 4. Plaintiffs prepared comprehensive state action discovery requests directed at the six defendants, and document and deposition subpoenas were issued for the insurance departments and rating bureaus in the thirteen affected states. Black Affidavit re State Action Discovery at ¶¶ 6-7. Several hundred thousand documents relating to the supervision of title insurance rate filings were produced to plaintiffs by

these entities. Id. at ¶ 11. These documents were distributed to the particular plaintiffs' counsel assigned to consider the state action defense in each state, and reviewed and analyzed by counsel. Id. at ¶ 12.

Plaintiffs interviewed numerous persons with knowledge relating to the title insurance industry and title insurance regulation, including insurance department personnel in the affected states, several experts with substantial experience in the title insurance field, the Attorney Generals' offices and watchdog agencies in several states, former employees at certain rating bureaus, and other persons with information relating to the operation of the major title insurance underwriters. Id. at ¶ 8. Plaintiffs also reviewed the publications of the American Land Title Association, which is the national trade association for the

title insurance industry, and many of the independent trade associations which operated in the affected states, as well as the transcripts of hearings, reports and other publications of the National Association of Insurance Commissioners. Id. at ¶ 9.

As part of their discovery effort, plaintiffs filed a motion seeking to compel defendants to respond to interrogatories pertaining to possible instances of the inclusion of referral payment costs in rate submissions, payments to employees of state insurance departments and investigations into any such payments. Plaintiffs argued that the evidence that they sought through the interrogatories about improper influence and the inclusion of the cost of unlawful referral payments in rate submissions would have been relevant as tending to show that there was not active state

supervision of the allegedly anticompetitive rating-bureau activities of the defendants. I ruled, however, that the "active state supervision" element of the state action defense focuses on the required procedures by which the state controls the challenged setting of prices, not on the behavior or effectiveness of individual state employees in carrying out those procedures. Memorandum and Order No. 2 (Order No. 2) dated September 9, 1985. The decision denying plaintiffs' discovery motion further eroded plaintiffs' chances of succeeding on their claims by effectively curtailing the permissible scope of the contention that there was a lack of active state supervision. Id. at ¶ 14.

Negotiations regarding a possible settlement of this litigation began soon after the Supreme Court's decision in Southern Motor Carriers and continued

throughout the state action discovery period. Affidavit of Allen D. Black Relating to Negotiations Leading to the Agreement of Settlement (Black Affidavit re Settlement Negotiations), ¶ 2. The negotiations were conducted on behalf of plaintiffs by Allen D. Black and Robert N. Kaplan, who were designated as Chairman and Vice-Chairman, respectively, of Plaintiffs' Executive Committee in my Order No. 1, dated May 20, 1985. Black Affidavit re Settlement Negotiations, at ¶ 3. Both Mr. Black and Mr. Kaplan are experienced and reputable counsel, who have extensive experience and expertise in antitrust and class action litigation. Mr. Black and Mr. Kaplan were selected by plaintiffs' Executive Committee as plaintiffs' sole representatives for purposes of conducting settlement negotiations with defendants and there was no competition from other plaintiffs' counsel to conduct

the settlement negotiations or to represent the proposed class. Id. at ¶ 4. The negotiations involved seven face-to-face meetings with defendants' counsel and a large number of negotiating sessions conducted by telephone. Id. at ¶ 5. Each stage of the settlement negotiations was discussed and agreed upon by plaintiffs' Executive Committee. Id. at ¶ 6. All of the negotiations that led up to the settlement were conducted in good faith and at arm's length by plaintiffs' counsel. By early October, 1985, after the relevant documents and interviews in each of the affected states had been reviewed and evaluated by plaintiffs' counsel and after I had denied plaintiffs' motion to compel discovery, an agreement in principle was reached between plaintiffs and defendants to settle the litigation. Id. at ¶ 7, 11. On January 8, 1986, after further negotiations, the

parties executed an Agreement of Settlement. Prior to its execution, the agreement was approved by plaintiffs' Executive Committee and each of the original named plaintiffs. Id. at ¶ 9.

The settlement agreement provides for both monetary and injunctive relief. For purposes of the agreement of settlement only, the defendants agree to stipulate to entry of an order confirming the following class pursuant to Federal Rule of Civil Procedure 23(b)(1) and/or (b)(2):

> All purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent of such underwriter with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985 inclusive.

Agreement of Settlement, dated January 8, 1986, ¶ 4.

The plaintiffs in the original cases

which were consolidated in MDL No. 633 are to represent the class. Id. at ¶ 5. In paragraph 7 of the settlement agreement, the defendants agree that in "full and complete settlement of the claims asserted in this action against defendants," the following injunction shall be entered:

> A. Each defendant shall be enjoined until December 31, 1987 from joining or participating in any way in any rating bureau in the Affected States; provided that this injunction shall apply in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin regardless of whether any such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state; and provided further that this injunction shall not prohibit defendants from joining or participating in a rating bureau in Louisiana, New Jersey, New Mexico, New York, Oregon, Pennsylvania or Wyoming as long as such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state. Pending the date upon which the order approving the settlement and entering the injunction

becomes final, each defendant agrees to be bound by the terms of this Paragraph 7A.

B. Each defendant shall be ordered affirmatively:

1. To increase by $5,000, without additional charge, the amount of insurance coverage for each title insurance policy for property located in any of the thirteen Affected States that has been issued by that defendant or its agent to an insured member of the Settlement Class during the class period as defined above;

2. With respect to transactions in which members of the Settlement Class did not become insureds of any of the defendants in the class period (either because they purchased title insurance for the benefit of others, or because they purchased title insurance from a non-defendant underwriter or an agent of a non-defendant underwriter), to provide the last $5,000 of insurance coverage without charge in connection with any new title insurance policy purchased from any of the defendants by such a class member for property located in any of the thirteen Affected States within the one year period following the date that the order approving the settlement becomes final; and

3. To make good faith

> efforts to inform members of the Settlement Class of their entitlement to the provisions described in Paragraph 7(B) at such times as individual class members may be entitled to benefit from such provisions, (i.e., when an insured class member makes a material claim under his policy; or when an insured class member is entitled to a re-issue rate on a new policy and the charge for the new policy is affected by the provisions of Paragraph 7(B)(1); or when a non-insured class member applies to purchase a new policy to which Paragraph 7(B)(2) applies.)

The defendants agree to use their best efforts to get regulatory approval of the settlement in the thirteen affected states. Id. at ¶ 10.[3] They also agree

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3. Defendants submitted the proposed settlement to the insurance departments in all of the affected states. The insurance departments in eleven of the thirteen affected states, Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Oregon, Pennsylvania and Wyoming, have written in response that they approve in concept, or do not object to, the proposed settlement. See Defendants' Memorandum, Exhibits B-F and Supplemental Memorandum of Defendants Addressing Objections to the Proposed Settlement (Defendants' Supplemental

to pay "all of the necessary and reasonable expenses, excluding attorneys' fees, of the administration of the settlement" including the cost of Notice by Publication to the class. Id. at ¶ 11.

In return for these concessions, the plaintiff class agrees that the final judgment approving the agreement of settlement will dismiss with prejudice

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Footnote No. 3 continued

Memorandum), dated April 23, 1986, Exhibits A-F. The insurance departments in the remaining two states, Ohio and Wisconsin, have not officially stated that they would either approve or disapprove the proposed settlement, though there is some indication that if I approve the settlement, they will allow its implementation. Defendants' Supplemental Memorandum, Exhibits G, H (Affidavits of John F. Graybeal and Erich E. Everbach). Failure to obtain regulatory approval of the settlement agreement in any state will not effect the agreement unless the plaintiffs, in good faith, believe that the failure has materially reduced the benefits to be received by the class as a whole, in which case the plaintiffs are excused from performing their obligations under the settlement agreement. Agreement of Settlement, ¶ 10.

> all claims the Settlement Class may have as against defendants, their respective parents, subsidiaries, affiliates, agents, officers, directors and employees, arising under the laws of the United States or of any state or other jurisdiction that are based on, relate to or arise out of any allegations that any of them agreed or conspired to fix, raise, maintain, stabilize or otherwise affect the prices of title insurance, including title search and examination and/or settlement services.

Agreement of Settlement, at ¶ 13.

Both parties agreed to seek authorization from the court to negotiate an agreement on either the amount of attorney's fees, costs and expenses of litigation to be paid by defendants or a maximum amount of attorney's fees, costs and expenses of litigation for which plaintiffs will apply to the court to be paid by defendants. Agreement of Settlement, ¶ 12. Defendants had the option of terminating the agreement if the parties were unable to negotiate a satisfactory fee award and were unwilling to submit the

issue for me to decide. Id. Other than plaintiffs' counsel informing defendants' counsel of the approximate number of hours spent by plaintiffs' counsel on the case and the approximate lodestar value of that time, no negotiation of the amount of attorney's fees to be paid was discussed during the settlement negotiations. Affidavit of Allen D. Black Relating to Negotiations with Defendants Concerning Attorneys' Fees, dated April 23, 1986, ¶ 3. By order dated January 29, 1986, I tentatively approved the settlement agreement pending notice to the class and a hearing. I further authorized the parties to negotiate the amount of attorney's fees to be paid by defendants and instructed plaintiffs' counsel to file a fee application. Counsel for plaintiffs and defendants negotiated an agreement whereby plaintiffs' counsel would apply to the court for attorney's fees and expenses

not to exceed $650,000 in counsel fees and $65,000 in litigation expenses. On March 3, 1986, plaintiffs' counsel submitted an attorney's fee petition in conformity with this agreement.

In my January 29, 1986 order, I conditionally certified plaintiffs' proposed class under Federal Rule of Civil Procedure 23(b)(1) and (b)(2), and I directed defendants to provide notice of the proposed settlement agreement to the class by publication in thirty-six listed publications in the affected states on two separate days in February of 1986. The notice set out the description of the conditionally certified class and the terms of the proposed settlement. Order, dated January 29, 1986, Exhibit A. It also set April 10, 1986 as the date for the final hearing on the settlement agreement and instructed those objecting to the settlement to file written

objections with the court on or before March 27, 1986, if they wished to challenge the proposed settlement agreement. All inquiries concerning the proposed settlement were to be directed to liaison counsel for plaintiffs or defendants' counsel, Bell, Boyd & Lloyd. Class members could request free copies of the settlement agreement from Bell, Boyd & Lloyd.

Defendant filed the required proof of publication with the court on March 20, 1986.[4] Counsel for plaintiffs received over two hundred inquiries from class members concerning the proposed class. See Affidavit of Donald L. Perelman Relating to Responses from Class Members

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4. The aggregate weekday circulation of the thirty-six newspapers in which the notice was published, based on information obtained by defendants' counsel, is 6,250,814. Defendants' Supplemental Memorandum, Exhibit J (Affidavit of Patrick J. Roach), ¶ 4.

to the Notice of Proposed Settlement (Perelman Affidavit), dated April 23, 1986, ¶ 2. Many of these inquiries requested information on how to be included in the proposed class. Id. at ¶ 3. Counsel for defendants received over 450 requests for information about the settlement and forwarded copies of the proposed settlement agreement to each of the parties requesting information. Defendants' Memorandum, p.31. Twenty letters from potential class members were filed with the court objecting to the proposed settlement. The Attorneys General of Montana, New Jersey, Ohio, Pennsylvania and Wisconsin (objecting states) filed a joint memorandum in opposition to the proposed settlement on behalf of their respective states as purchasers of title insurance and as parens patriae on behalf of their

residents who are class members.[5] The

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5. Although the objecting states have standing to object to the settlement based on their own purchases of title insurance and settlement services from the defendants, it is not at all clear that they have standing to object on behalf of their residents as parens patriae. The antitrust laws, 15 U.S.C. § 15c, permit suits by states as parens patriae for monetary damages. In this action, however, the objecting states did not originally bring suit, but rather they merely seek to object to a settlement. The settlement primarily provides injunctive relief, not monetary relief. Section 15c(b) also imposes various procedural requirements, such as notice to the state residents and the right to opt out of the state's action, which have not been complied with in this case. Furthermore, none of the objecting states has indicated that it plans to challenge the defendants' rating-bureau activities in their own respective states or elsewhere under 15 U.S.C. § 15c if they are successful in objecting to the settlement. In fact, one objecting state, Pennsylvania, has filed an amicus curiae brief in the action by the FTC, challenging the action against the defendants in Pennsylvania and arguing that the Pennsylvania regulatory scheme meets the requirements of Southern Motor Carriers. Defendants' Memorandum, Exhibit A (Amicus Curiae Brief of the Commonwealth of Pennsylvania, Insurance Department). Since the objecting states have properly presented their objections to the settlement as class members in their own right, I need not decide whether they have standing to challenge the settlement as parens patriae on behalf of their residents, who are members of the class.

State of Arizona also moved to be excluded from the proposed class on behalf of itself and its residents as parens patriae.

On April 10, 1986, I held the scheduled hearing as set forth in the notice of proposed settlement, at which an opportunity to present evidence was afforded counsel, and argument was heard on the proposed settlement. The only objector who appeared and argued against the proposed settlement at the hearing was Matthew C. Lawry, Assistant Attorney General of Ohio, who represented the objecting states. Neither Mr. Lawry nor any of the other objectors presented any evidence at the hearing. Subsequent to the hearing, both plaintiffs and defendants submitted additional affidavits in support of the settlement and filed proposed findings of fact and conclusions of law.

Having set out the procedural posture

of this case leading up to the proposed settlement, I turn to the question of whether, pursuant to Federal Rule of Civil Procedure 23(e), the settlement should be approved. Prior to addressing the adequacy and fairness of the settlement itself, I must consider whether certification of a class under Rule 23(b)(1) and/or (b)(2), as stipulated to in the proposed settlement, is proper. See Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 (3d Cir. 1973) (there is no "impediment to determining class actions for purposes of settlement only").

I. Class Certification

Certification of a class under Rule 23(b)(1) and/or (b)(2) first requires that the proposed class meet the prerequisites of Rule 23(a). Rule 23(a) allows certification of a class only if

> (1) the class is so numerous that joinder of all members is

> impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The numerosity requirement is easily satisfied in this case. The class, as proposed, is estimated to include more than 3.4 million people. Defendants' Supplemental Memorandum, Exhibit I (Affidavit of Robert L. Stratton), ¶ 7. It would clearly be impracticable to attempt joinder of all the members of the proposed class. None of the parties or objectors argue otherwise.

This case presents issues of law and fact common to all of the proposed class members. The primary legal issues in this case are whether plaintiffs' antitrust claims are barred by the state action defense, the McCarran-Ferguson Act and the filed tariff doctrine; or conversely,

whether joint filing of rates by the defendant-competitors through rating bureaus as approved by state law, violates the prohibition against price-fixing combinations under the federal antitrust laws. These legal issues are common to the entire proposed class. See In Re Sugar Industry Antitrust Litigation, 73 F.R.D. 322, 335 (E.D. Pa. 1976) ("Antitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy"). The primary factual issues in this case would appear to be the extent of each individual defendants' participation in the rating bureaus and the quantum of active supervision of the rate-making process in each state. Although the involvement of the defendants in the rating bureaus and the extent of supervision may vary somewhat in the

different affected states, the overall pattern of involvement as it applies to the state action defense is essentially the same. Furthermore, the commonality requirement of Rule 23(a)(2) is not as stringent as that of 23(b)(3) which requires that the common issues predominate in the litigation. See Wilensky v. Olympic Airways, S.A., 73 F.R.D. 473, 477 (E.D. Pa. 1977); 7 C. Wright & A. Miller, Federal Practice and Procedure § 1763 at 610 (1972).

Similarly, the claims of the class representatives, the plaintiffs in the individual suits which were consolidated in this litigation are typical of those of the proposed class since they all involve challenges to defendants' participation in rating bureaus. The defenses raised by defendants against the plaintiffs' claims are also the same as those that are raised against all of the proposed class members.

The objecting states argue that the differences in the regulation of the rating bureaus by the thirteen affected states makes the defendants' state action defense of different strength in each state. They contend that since the strength of defendants' state action defense will vary in each state, the corresponding strength of plaintiffs' claims will also vary in each state and, thus, the representative plaintiffs may not adequately represent the class members in states other than the states in which the class representatives are residents. Although this argument has some superficial appeal, it is flawed as an attack on certification of the proposed class because it is entirely speculative. See Robertson v. National Basketball Association, 389 F. Supp. 867, 899 (S.D.N.Y. 1975) ("Class action determination will not be denied, nor will the formulation of

subclasses be required in the absence of a showing that the alleged potential conflicts are real probabilities and not mere imaginative speculation."); Reynolds v. National Football League, 584 F.2d 280, 286 (8th Cir. 1978) (theoretical conflicts of interest do not "require subclassification, disqualification of the named parties and class counsel, or disapproval of the settlement"). The objecting states, although given ample opportunity, have presented no evidence that the defendants' rating bureau activities were subject to materially different regulations or supervision in any of the affected states. This failure to present evidence is particularly problematic for the objecting states since presumably they are in the best position to provide evidence on the nature of the state regulation of the rating bureaus, at least in their own individual states.

The only objecting state to even address the issue of the nature of its regulation of rating bureaus was Wisconsin. In a letter to the court, dated April 16, 1986, two Assistant Attorney Generals from Wisconsin assert that the state regulators did not take any regulatory action with regard to the fees for title search and examination submitted to them. They claim that no data or cost justification for the fees was submitted to the regulators from which it could be determined whether the fees were excessive, inadequate or unfairly discriminatory. The first problem I have with the letter from Wisconsin is that it is unsupported by any affidavits and it was never properly filed in this case. The second problem is that even if I accept the assertions in the letter as true, there is no indication whether the failure to actively supervise alluded to in the

letter is a result of an inherent inadequacy in the Wisconsin regulatory scheme or merely an isolated example of a breakdown in the proper functioning of the system. As I pointed out in my Memorandum and Order No. 2, dated September 9, 1985, the active state supervision requirement of the state action defense focuses on the procedures by which the state controls the challenged setting of fees, not on the behavior or effectiveness of individual employees in carrying out those procedures. Finally, the defendants, in a reply to the Wisconsin letter, vehemently contest the assertion that Wisconsin does not actively supervise the collective rate-making process. The defendants note that they filed extensive written justifications with their rate proposals and also assert that the deposition evidence before the FTC shows that Wisconsin fully reviewed the submitted rate proposals.

Thus, I find that the objecting parties have presented nothing more than a speculative challenge to the typicality of the representative plaintiffs' claims and the proposed class therefore meets the requirements of Rule 23(a)(3).

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Rule 23(a)(4). The Third Circuit Court of Appeals has held that adequacy of representation depends on two factors: "(a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 247 (3d Cir.), cert. denied, 421 U.S. 1011 (1975). The objectors do not challenge, nor do I question, the

expertise and extensive experience of plaintiffs' counsel in litigating complex class actions. The second factor, that plaintiffs not have interests antagonistic to those of the class, is similar to the typicality requirement of Rule 23(a)(3) in that both requirements seek to insure that plaintiffs will properly present the claims of the class members. Cohen v. Uniroyal, Inc., 77 F.R.D. 635, 691 (E.D. Pa. 1977). Plaintiffs' interests in this litigation are not antagonistic to those of the proposed class since the plaintiffs and the proposed class were all allegedly injured by essentially the same alleged illegal rating bureau activities of the defendants. As I found above, the potential differences between the regulation of the challenged rating bureau activities in the different affected states have not been shown to be material differences. I conclude that the requirement of Rule

23(a)(4) has been met in this case.

A. Rule 23(b)(1)

Having satisfied the requirements of Rule 23(a), the proposed class must also come under one or more of the three categories set out in Rule 23(b). The settling parties seek certification under Rule 23(b)(1) and/or (b)(2). I had conditionally certified the proposed class under both Rule 23(b)(1) and (b)(2) in the Order of January 29, 1986, in which I ordered notice of the proposed settlement to be published and in which I scheduled the final hearing on the proposed settlement.

Rule 23(b)(1) requires that:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct

> for the party opposing the class or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

The settling parties rely on subsection (A) of Rule 23(b)(1) and argue that any injunctive relief obtained by plaintiffs in individual actions could subject defendants to inconsistent rulings as to their participation in rating bureaus. I agree that there is a serious risk that courts in separate actions could impose inconsistent obligations on the defendants in trying to fashion injunctive relief that cures any potential antitrust problems that defendants' rating bureau activities were found to cause. This risk goes beyond the ever-present risk in multiple adjudications that one court may find certain activity to violate the

antitrust laws and another may find no violation in the same activity. See Bogosian v. Gulf Oil Corp, 62 F.R.D. 124, 132 (E.D. Pa. 1973), vacated on other grounds, 561 F.2d 434 (3d Cir. 1977), cert. denied, 434 F.2d 1086 (1978) ("[Rule 23(b)(1)(A)] requires not only 'inconsistent and varying adjudication,' but such adjudications must establish 'incompatible standards of conduct.'"). The risk of the inconsistent restructuring of defendants' rating bureau activities in this case is similar to the risk of inconsistent restructuring of the rules and practices of the National Football League which the court in Reynolds, 584 F.2d at 283-84, found sufficient to justify certification of a class under Rule 23(b)(1)(A). Thus I find that certification of the proposed class under Rule 23(b)(1)(A) is appropriate for purposes of the proposed settlement.

B. Rule 23(b)(2)

The settling parties also seek certification of the proposed class under Rule 23(b)(2) which provides for a class action where

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

In this case the proposed plaintiff class is challenging the defendants' rating bureau activities; activities which are generally applicable to the proposed class of title insurance and settlement services purchasers. The injunctive relief contained in the proposed settlement related directly to the rating bureau activities of the defendants and thus provides a remedy for the class as a whole. Injunctive relief or declaratory relief with respect to the class as a

whole would thus be appropriate. This case is properly certifiable under Rule 23(b)(2) since the proposed class seeks to define the defendants' relationship with the world at large by seeking to limit the defendants' rating bureau activities. See Weiss v. York Hospital, 745 F.2d 786, 811 (3d Cir. 1984), cert. denied, 105 S. Ct. 1777 (1985).

The objecting states argue that this action cannot properly be certified under Rule 23(b)(2) since the relief sought by the class is primarily monetary. This argument overlooks the fact that the relief contained in the proposed settlement is primarily injunctive. The plaintiffs, in their original individual actions, had sought treble damages under 15 U.S.C. § 15. However, after re-evaluating their case in light of the Southern Motor Carriers decision, they in effect dropped their treble damage claim and now

seek approval of the proposed settlement and its injunctive relief provisions. Certification of the proposed class under Rule 23(b)(2) is not precluded by the fact that the settlement provides for some monetary relief in the form of title insurance policy enhancements, since the primary relief provided is injunctive and since the challenged conduct of the defendants is such that injunctive relief would be appropriate. See Wetzel, 508 F.2d at 251 (Class action maintainable under Rule 23(b)(2) even though monetary relief is sought as well as injunctive relief). Thus I find that for purposes of the proposed settlement, the proposed class can be properly certified under Rule 23(b)(2).

Since I have found that the proposed class is properly certifiable under both Rule 23(b)(1)(A) and (b)(2), I need not consider the objecting states' argument

that notice to the class was insufficient under Rule 23(c)(2), or the State of Arizona's request to opt out of the suit under the same section since that section only applies to classes certified under Rule 23(b)(3). See Walsh v. Great Atlantic & Pacific Tea Co, 726 F.2d 956, 963 fn.3 (3d Cir. 1983) (No right to opt-out under Rule 23(b)(1) or (b)(2).

Where an action is properly certifiable under either Rule 23(b)(1) or (b)(2) and Rule 23(b)(3), it has been held to be preferable to certify it under Rule 23(b)(1) or (b)(2) in order to avoid the added procedural requirements of a Rule 23(b)(3) class action. See Wetzel, 508 F.2d at 252-53 (if both Rule 23(b)(2) or (b)(3) are applicable, court should use 23(b)(2)), and Robertson v. National Basketball Association, 556 F.2d 682, 685 (2d Cir. 1977) (court should use Rule 23(b)(1) when both 23(b)(1) and 23(b)(3)

are applicable). See also 7A C. Wright and A. Miller, Federal Practice and Procedure §§ 1772, 1775 (1972).

Both the objecting states and the State of Arizona argue that even if Rule 23(c)(2) is not applicable, due process requires that the proposed class members be provided with more effective notice and be given the opportunity to opt out of the class. These two issues, notice and the right to opt out, are closely related since due process would probably require that potential class members receive notice comporting with Rule 23(c)(2), including individual notice wherever possible of their right to opt out of the class if I were to require that such an opt-out option be provided in this case. See Penson v. Terminal Transport Co., 634 F.2d 989, 994-95 (5th Cir. 1981) (notice of a proposed consent decree to member of a 23(b)(2) class inadequate where it

failed to alert class member that consent decree contained an opt-out provision). However, if I decide that no opt-out provision is required, then the notice required by Rule 23(c) in this case, as in any other class action under Rule 23(b)(1) or (b)(2), "need only be such as to bring the proposed settlement to the attention of representative class members who may alert the court to inadequacies in representation, or conflict in interest among subclasses, which might bear upon the fairness of the settlement." Walsh, 726 F.2d at 963. I see no need in the present case to require that class members be permitted to opt-out of the proposed settlement. The rights of the proposed class are adequately protected by the Rule 23 requirements that the class be adequately represented by the representative plaintiffs and by qualified counsel, that the class receive some adequate form

of notice of the proposed settlement and that the court approve the settlement only if it is fair, adequate and reasonable. Kincade v. General Tire & Rubber Co, 635 F.2d 501, 507-08 (5th Cir. 1981); Robertson, 556 F.2d at 685-86.

I also note that the benefits of the proposed settlement are provided to the class members without any affirmative action on their part. Thus, they need not have actual notice of the settlement to benefit from it. See Greenfield, 483 F.2d at 833 (Published notice inadequate where class members had to affirmatively file a claim in order to obtain settlement benefits.).

Furthermore, I would not exercise any discretion I may have to require an opt-out provision in this case because to do so would go against the strong public policy in favor of settlement of class actions. See Cotton v. Hinton, 559 F.2d

1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."). It is, in my view, highly unlikely that defendants would agree to settle this case if they would still face the prospect of having to defend against one or more suits on these same issues by parties who had opted out of the settlement. Given my pessimistic view of plaintiffs' chances of any recovery by way of either injunctive or declaratory relief or the award of monetary damages in this case after the Southern Motor Carriers decision, I would anticipate that the end result of the failure to settle this case would be the failure of any of the proposed class members to receive any recovery either monetary or injunctive against the defendants for any alleged antitrust violation. I find that, based on the objections to the settlement which

I received and the presentation by Mr. Lawry on behalf of the objecting states at the April 10, 1986 hearing, that the published notice required by my order of January 29, 1986, which appeared in thirty-six newspapers in the affected states with a combined circulation of over six million, served its purpose under Rule 23(e) as set out in Walsh.[6] Therefore,

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6. Each of the defendants has submitted an affidavit describing the difficulties that would be faced in trying to mail individual notice of the proposed settlement to the class members. Defendants' Memorandum, Exhibits H-M. Due to the nature of the title insurance business, the defendants do not keep current address lists of their insureds or of the purchasers of title insurance who often buy title insurance for the benefit of others. Even an exhaustive and time-consuming search of all the defendants' files, which are not centrally located, would not produce a complete or accurate list of the plaintiff class or their addresses. The expense of requiring the defendants to provide individual notice to class members, assuming that it was even possible to provide such notice, would probably result in defendants withdrawing from the settlement. The settlement agreement itself provides defendants with an option to withdraw from the settlement

this action can be properly certified under Rule 23(b)(1) and (b)(2) without an opt-out provision and without further notice to the class.

II. Approval of the Settlement

Having determined that the proposed class can be properly certified under Rule 23(b)(1) and (b)(2), I now turn to the question of whether I should approve the settlement reached by the representative plaintiffs and the defendants. In deciding whether to approve a settlement under Rule 23(e), I must determine whether the settlement is fair, adequate and reasonable . Walsh, 726 F.2d at 965 (3d Cir. 1983). The Third Circuit Court of

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Footnote 6 continued

if the court orders notice which would be substantially more expensive than the notice by publication agreed to by the settling parties. Agreement of Settlement, ¶ 6.

Appeals in Girsh v. Jepson, 521 F.2d 153, 156-57 (3d Cir. 1975), borrowing from the Second Circuit's opinion in City of Detroit v. Grinnell Corp, 495 F.2d 448, 463 (2d Cir. 1974), set out some of the relevant factors to be used in determining the fairness of a proposed settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In view of the Second Circuit in Grinnell, the last factor, which subsumes many of the others, is the most important in judging the settlement. Grinnell, 495 F.2d at 455. See also Kusner v. First

Pennsylvania Corp., 74 F.R.D. 606, 608 (E.D. Pa. 1977), aff'd, 577 F.2d 726 (3d Cir. 1978) (quoting Grinnell).

Another important consideration in evaluating the fairness of the settlement, and one which directly influences my acceptance of the parties' presentation of the settlement in this case, is whether or not I find evidence of collusion among the parties, or whether the settlement was truly an arm's-length negotiated agreement. See Cotton, 559 F.2d at 1330 (5th Cir. 1977) ("Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel."); In Re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. 305, 315 (D. Md. 1979) ("The factors tending to reveal the 'fairness' of a settlement are those which indicate the presence or absence of collusion among the parties."). One of

the primary goals of the inquiry into the fairness, adequacy and reasonableness of the settlement is to insure that absent class members are not being unfairly deprived of the prospect of a reasonable recovery and that their interests were adequately represented by the class representatives. Robertson v. National Basketball Association, 72 F.R.D. 64, 68 (S.D.N.Y. 1976), aff'd, 556 F.2d 682 (2d Cir. 1977). However, in reviewing the fairness of the settlement and considering the objections of the class members I must avoid making the settling parties "justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." Milstein v. Werner, 57 F.R.D. 515, 524-25 (S.D.N.Y. 1972). My role is to approve or disapprove the settlement as

negotiated by the parties, not to rewrite it to conform with my own view of an ideal settlement, or that of any of the objectors. Armstrong v. Board of School Directors, 616 F.2d 305, 315 (7th Cir. 1980). Compromise is the essence of a settlement and as long as the compromises reached by the parties place the settlement within the range of settlements which are reasonable given the facts of the case, the settlement should be approved. See In Re Corrugated Container Antitrust Litigation, 659 F.2d 1322, 1324-25 (5th Cir. 1981), cert. denied, 456 U.S. 998 (1982).

The first, and perhaps most important, factor I will examine is whether the settling parties negotiated the settlement in good faith. This factor is critical because in order to avoid the necessity of conducting a trial on the merits in approving a settlement it is necessary for

the court to rely in substantial part on the evaluations of the case made by counsel. This reliance is only justified if counsel for the parties have negotiated the settlement at arm's length and in good faith. See Weinberger v. Kendrick, 698 F.2d 61, 74 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983). In the present case, in Order No. 1, dated May 20, 1985, an Executive Committee of Plaintiffs' Counsel was established and Allen D. Black and Robert N. Kaplan were appointed respectively as Chairman and Vice-Chairman. All negotiations on behalf of the plaintiffs were carried out by these two with the consent of the Executive Committee. Black Affidavit re Settlement Negotiations, ¶¶ 3, 6. This procedure avoided competition among plaintiffs' counsel to negotiate the settlement and allowed the plaintiffs to present a unified position to the defendants, thus avoiding some of

the difficulties encountered when a settlement is negotiated by separate plaintiffs' counsel prior to class certification. Ace Heating & Plumbing Co. v. Crane Co, 453 F.2d 30, 33 (3d Cir. 1971). Both Mr. Black and Mr. Kaplan are able and experienced counsel and fully capable of adequately representing the class's interests and of negotiating a fair settlement. Discovery on the crucial issue of the applicability of the state action defense in the affected states had progressed sufficiently for plaintiffs' counsel to make an intelligent assessment of the strengths and weaknesses of their case prior to entering into extensive negotiations. I have noted earlier the extensive discovery efforts on the state action defense issue made by plaintiffs' counsel after my order limiting discovery to that issue. Furthermore, in the course of my supervision of the case, I have been

impressed with plaintiffs' counsels' diligence in pursuing the class's interests, and I have seen no evidence of any collusion between the parties as to any aspect of this case or in their settlement negotiations. Contested motions were presented to the court by the respective parties in a genuinely adversarial posture. Plaintiffs' counsel, Allen Black, in a sworn affidavit, has attested to the fact that the negotiations were "conducted in good faith and at arm's length." Black Affidavit re Settlement Negotiations, ¶ 10.

The objecting states argue that the shift from bringing this case as a Rule 23(b)(3) class action for treble damages to settling it as a Rule 23(b)(1) and (b)(2) class action providing essentially only injunctive relief, and the form of notice provided indicates some form of improper conduct on the part of

plaintiffs' counsel. I reject these suggestions. First, both the certification of the class and the form of notice to the class required and received court approval. Second, the shift from a Rule 23(b)(3) class to a Rule 23(b)(1) and (b)(2) class was brought about by a concomitant shift from an action seeking treble damages to an action seeking primarily injunctive relief. That shift was the result of plaintiffs' counsels' reasonable reassessment of the strength of the case after the decision in Southern Motor Carriers. I find nothing in either the class certification or the notice to the class to indicate that plaintiffs' counsel was acting in anything but the best interests of the class. The objecting states also question the fact that the class in this case was not certified until after the settlement had been negotiated. However, as I noted

above, the appointment of an Executive Committee of plaintiffs' counsel cured most of the evils usually associated with settlements negotiated prior to class certification.

Another challenge raised by the objecting states deserves mention. The objecting states argue that the plaintiffs' counsel may receive attorney's fees of $650,000 while, according to the objecting states, the plaintiff class will receive nothing of monetary value. I have not yet ruled on plaintiffs' counsel's fee petition. More importantly, I find no merit whatsoever in the objecting states' claim that the plaintiff class receives no monetary or other tangible benefits from the proposed settlement. Both the injunctive and the monetary aspects of the settlement provide tangible and genuine aid to the class, which, as I will discuss, is fair, reasonable and adequate

in light of the apparent weakness of the plaintiffs' claims. One objector, remarking on the amount of the attorney fee sought, suggested that the fee be divided among the members of the class. The unreasonableness of this suggestion becomes evident when one considers that each class member, in the class of over three million people, would receive less than twenty-five (25) cents if the class split the fee award of $650,000 equally and no costs were involved in the distribution.

The objecting states question whether there was a simultaneous negotiation of the settlement and the attorney's fees. See Prandini v. National Tea Co., 557 F.2d 1015, 1017 (3d Cir. 1977) (Improper to negotiate settlement and attorney's fees contemporaneously). However, counsel did not negotiate the amount of attorney's fees until after presenting the settlement

agreement to me at a conference on January 28, 1986, at which time I authorized the parties to negotiate on the issue of attorney's fees. Based on all of the available information including affidavits, there has been no violation of Prandini in the negotiation of attorney's fees in this case. I therefore conclude that there were no improprieties in the negotiation of this settlement and that all negotiations took place at arm's length. Since I have found that the negotiations were carried out in good faith, with no collusion between the parties which could prejudice the absent class members, I may rely upon, and should be hesitant to ignore, the judgment of counsel in evaluating their case for purposes of settlement. Cotton, 559 F.2d at 1330 (5th Cir. 1977).

The next major factor to be analyzed is the probability of plaintiffs recover-

ing on their claims. This requires an examination not only of the probability of plaintiffs proving liability but also an examination of the risks plaintiffs face in proving damages and in maintaining this action as a class action through the trial. It is only after evaluating the strength of plaintiffs' case that I can properly determine whether the settlement provides fair and reasonable compensation to the plaintiff class. One of the purposes of a settlement is to avoid the necessity of having the court and jury resolve disputed issues of fact and law and thus my review of the strength of plaintiffs' legal claims is not intended as a resolution of the merits of plaintiffs' case. Florida Trailer and Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960); Grinnel, 495 F.2d at 456 (2d Cir. 1974) ("It cannot be overemphasized that neither the trial court in approving

the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute.").

The primary obstacle to plaintiffs establishing antitrust liability in this case is the state action defense as set out by the Supreme Court in Southern Motor Carriers. Prior to the decision in Southern Motor Carriers the plaintiffs believed that they could avoid the state action defense because participation in the rating bureaus was permitted but not compelled by statute in the affected states. After the Southern Motor Carriers decision, it became clear that defendants could take advantage of the state action defense against plaintiffs' antitrust claims even though their participation in the rating bureaus was not compelled by the affected states. Under the state

action defense the defendants' participation in rating bureaus would not be a basis for antitrust liability, regardless of its anticompetitive effect, if the affected states had a clearly articulated and affirmatively expressed policy permitting such participation and if the states actively supervised the allegedly anticompetitive conduct. Southern Motor Carriers, 105 S. Ct. at 1727.

Plaintiffs' counsel conducted extensive discovery on the state action defense issue in the affected states from which it appeared that all of the affected states had statutes permitting collective rate-making. My order of May 20, 1985 made clear that the existence of statutes explicitly permitting collective rate-making would satisfy the first prong of the state action defense. Even in the absence of explicit statutory authority, however, a defendant can satisfy the first

prong of the test by showing that the "state's intent to establish an anti-competitive regulatory program is clear." Southern Motor Carriers, 105 S. Ct. at 1731. Thus, given their discovery, it was reasonable for plaintiffs' counsel to conclude that the first prong of the state action defense had been met.

Plaintiffs' counsel, therefore, quite properly focused the larger part of their discovery effort into examination of the second prong of the state action defense: active state supervision. Their evaluation of the results of their discovery efforts were informed by my decision on September 9, 1985, denying their motion to compel discovery. In that decision, I determined that the focus of the active state supervision is on the procedures set out by the state to control the anti-competitive collective rate-making rather than on the effectiveness of the

Of Consumers." Petition for Certiorari at 18. He acknowledges that the class consisted of approximately 3.4 million to 4.3 million consumers in thirteen different states. He then assumes that 700,000 to 900,000 consumers in Arizona, Connecticut and Wisconsin still have viable damage claims and that consumers in those states should be given an opportunity to opt out of the class. By these statistics, the State Attorney General suggests that a large number of people will be harmed if the Court denies certiorari.

In fact, it is Arizona's attempt to sabotage the settlement that harms millions of consumers. The settlement was fair, reasonable and adequate, as the district court expressly determined.[12] In making that determination, the district court appropriately balanced the settlement benefits against the risks and costs of continued litigation:

> I would anticipate that the end result of the failure to settle this case would be the failure of any of the proposed class members to receive any recovery either monetary or injunctive. . . .

App. to Pet. at 50a.

> [T]he adequacy of the settlement is measured not by the absolute value of the settlement, but by the

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[12] Arizona's assertion that "[t]he vast majority of class members . . . were to receive nothing under the settlement" (Petition for Certiorari at 7) is contrary to the facts found by the district court. The district court recognized that class members would receive substantial benefits under the settlement. He found that policy enhancements provided in the settlement shifted an appreciable risk to the defendants and in doing so provided a valuable benefit to the plaintiff class whether or not individual members made claims on those policies. The district court also found that the additional insurance would entitle class members to higher reissue and refinance rate credits on policies they might buy in the future. This benefit, too, did not depend upon whether a class member filed a claim on his title insurance policy. App. to Pet. at 83a-84a.

> relation of that value to the probability of recovery on the merits. Given the weakness of plaintiffs' claims, the fact that plaintiffs' counsel had to compromise on a settlement which does not provide all the relief suggested by the objectors does not mean that the settlement is inadequate.

App. to Pet. at 88a.

> Thus, I conclude that the injunctive and monetary provisions of the settlement provide substantial benefits to the plaintiff class which are fair and adequate in view of the plaintiffs' chances of succeeding on the merits of their claims.

App. to Pet. at 94a.

Literally millions of people have been notified of the settlement, have raised no objection, and currently expect to receive its benefits. The defendants entered the settlement on the understanding that it would become effective only if *all* related claims were resolved. If one or more class members are permitted to opt out, there is no settlement, and millions of consumers would lose the benefits conferred by the settlement.

Arizona misleads the Court as to the number of class members seeking reversal of the Third Circuit's decision. There is one entity seeking review, the State of Arizona, by its Attorney General. The Arizona Attorney General has no authority to opt out on behalf of Arizona residents in private antitrust litigation, particularly when he has not even informed them that he has acted to deprive them of the settlement benefits they currently expected to receive.[13] Furthermore, Arizona's discussion

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[13] To the extent this Court should have any due process concerns, those concerns should be directed to the Attorney General of the State of Arizona, who has failed to notify Arizona residents that he is seeking to override their ability to determine for themselves whether to accept a compromise of the litigation. Arizona residents and other members of the class have received notice of the settle-

of potential claims by Connecticut and Wisconsin residents is both speculative and irrelevant. No resident of Connecticut or Wisconsin pursued an appeal to the Third Circuit and no resident of Connecticut or Wisconsin is before this Court. Neither of these other states joined Arizona's appeal to the Third Circuit, nor does the State of Arizona represent those states or their residents before this Court. In this case a single member of a class of several million asserts a right to opt out to pursue its individual claims.

Moreover, the potential claims which Arizona seeks to preserve from settlement are essentially worthless. Arizona suggests that the decision of a Federal Trade Commission administrative law judge somehow demonstrates that class members have viable claims under federal antitrust laws. That decision under Section 5 of the FTC Act cannot govern whether it was appropriate for the district court to approve the settlement in this case. Furthermore, even if the administrative law judge's decision were relevant, the decision was that there was active state supervision in Arizona and that defendants' conduct was legal there.[14] So the Attorney General of Arizona would have no viable federal claim even if that decision were applicable.

Arizona further maintains that consumers in Arizona have damage claims under state antitrust law, even if they do not have damage claims under federal antitrust law. Petition for Certiorari at 10. Apparently Arizona contends that, although the state action doctrine immunizes the defendants' conduct under federal antitrust law,

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ment and made inquiries to protect their interests. No resident of Arizona objected or tried to opt out. The vast majority of the class apparently decided to accept the settlement. They have not been notified that Arizona is attempting to countermand that decision.

[14] *In re TICOR Title Ins. Co., et al.*, FTC Dkt. No. 9190 (Dec. 22, 1986).

the same conduct that the defendants are authorized to engage in under Arizona insurance statutes and regulations could be a violation of Arizona antitrust law.

Again, the Attorney General errs. Obviously it would be unfair for one arm of state government to authorize conduct that another arm of state government condemns as illegal. Moreover, the Arizona Supreme Court has held that a specific state statute authorizing conduct that might otherwise be illegal under state antitrust laws immunizes that conduct from the general state antitrust law. *Arizona Downs* v. *Arizona Horsemen's Foundation*, 130 Ariz. 550, 637 P.2d 1053 (1981). *Accord, Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813, 818 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982); *State* v. *Arizona Licensed Beverage Association*, 128 Ariz. 515, 627 P.2d 666, 670 (1981).

According to the Arizona Attorney General, absent class members have an absolute right to opt out of any class action with respect to any potential damage claims they might imagine that they have—no matter how the class is certified, no matter whether the class has secured a fair, reasonable and adequate settlement, no matter what the stage of the litigation, no matter how many other class members might be damaged by permitting opt outs, and no matter how many legal obstacles to any damage recovery exist at the time of settlement. However, an allegation of damages in a putative class action should not prevent a court from approving a comprehensive and equitable settlement. The Petition for Certiorari simply delays the implementation of a settlement that would benefit millions of people.

CONCLUSION

The Petition for Certiorari should be denied for all of the reasons set forth above. There is no conflict among the courts of appeals; nor is there a conflict between the Third Circuit's decision and this Court's decision in

Shutts. The district court acted properly in approving the settlement, and millions of class members would be benefited by implementation of the settlement that the district court approved.

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June 30, 1987

APPENDIX

Other Non Wholly-Owned Subsidiaries Or Affiliates Of Respondent Stewart Title Guaranty Company

Dewald Financial, Inc.
Stewart Title of Tampa
Stewart Title of Polk County
Interstate Title Corporation
Associated Abstract Agency, Inc.
Stewart-Fidelity Title Company
Stewart Title Agency of Salisbury, Inc.
Stewart Title of California (Santa Ana)
Stewart Title of Modesto
Old California Title Company
Stewart Title (Los Angeles)
Stewart Title of Fresno County
Stewart Title & Trust of Phoenix, Inc.
Stewart Title & Trust of Tucson
American General Financial Corporation
Blaine County Title
Island Title Corporation
Security Title Corporation
Stewart Title of Oregon
Stewart Title of Riverside County
Stewart Title of Central Jersey, Inc.
M.D. McGrail, Jr. & Associates
Stewart-Princeton Abstract
Stewart Title Company of Washington, Inc.
Stewart Title Agency of No. Jersey, Inc.
Stewart Title of Larimer County, Inc.
Stewart Title of Greeley, Inc.
Stewart Title of Denver, Inc.
Stewart Title of Utah
Stewart Title of Southern Maryland
Stewart Title of Northern Nevada
Stewart Title of Johnson County, Inc.

Stewart of Lubbock, Inc.
Stewart Title of Montgomery County, Inc.
Texarkana Title & Abstract Co., Inc.
Nacogdoches Abstract & Title Company
Stewart Escrow & Title Services of Lawton
Stewart Title of Northern Virginia
Stewart Title of Virginia
Landata, Inc. of San Antonio
Ingram & Associates, Inc.
Stewart Title of Prince George's County
Stewart Title of Ventura
Stewart Title of Howard County
Stewart Title Co. of Ogden
Stewart Title of Provo
Stewart Title of South Carolina
Stewart Title of Pennsylvania, Inc.
Stewart Title Agency of Ohio, Inc.
Stewart Title Co. of Memphis
Stewart Title Company of Michigan
Stewart Title Company of Minnesota
Stewart Title of Rhode Island
Landmark Title, Inc.
Fleetwood Management Corporation
Stewart Title Associates of Kansas City
Stewart Title of Pensacola
Stewart Metro Title Corporation
Stewart Title of Indianapolis, Inc.
Peoples Title Agency, Inc.
Insured Title
Intercounty Title Company of Illinois
American Surveying
Miller Brothers Trucking
Professional Real Estate Tax Service
South Texas Delivery Services of Houston
Star Courier
Star Delivery, Inc.
Stewart Title Agency of Bergen County
Stewart Title of Colorado Springs, Inc.
Stewart Title Company of Contra Costa

Intercounty Abstract Co. d/b/a
Stewart Title of New Hampshire
Stewart Title of Albuquerque
Stewart Abstract and Title Co. of Oklahoma
Stewart Escrow and Title Services of Norman
Stewart Title of Austin, Inc.
Stewart Title of Columbia, Inc.
Stewart-Duphorne Title Company
Stewart Title of Denton County, Inc.
Stewart Title of Waller County
Stewart Title of Rockport Inc.
Stewart Title Co. of Palestine
Stewart Title of Collin County
Stewart Title of Texarkana
Stewart Title of Vermont Inc.
Stewart Title of Mobile, Inc.
Citizens Title & Trust
Stewart Title of Southern California
Stewart Title of San Diego
Douglas County Title Co. Inc.
Sierra Land Title Corp.
Stewart Title of Nevada
BayPort Title Company
Penobscot Title Company
Stewart Metro
Stewart Title of Louisiana, Inc.
Stewart Title Guaranty Co.
Stewart Title of Indianapolis, Inc.
Stewart Title of Martin County
Stewart Title of Sarasota
Stewart Title of Sanford, Inc.
Stewart Title of Fort Meyers, Inc.
Stewart Title of St. Lucie County
Stewart Title of Aspen, Inc.
Stewart Title of Eagle County
Stewart Title of Glenwood Springs, Inc.
Stewart Title of Miami, Inc.

Stewart Title of Broward County
Stewart Title of Clearwater, Inc.
Stewart Title of Jacksonville, Inc.
Stewart Title of Palm Beach County

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No. 86-1963

IN THE SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1986

STATE OF ARIZONA,

PETITIONER,

vs.

CHICAGO TITLE INSURANCE CO., ET AL.,

RESPONDENTS.

On A Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Third Circuit

Brief For The States Of Connecticut And Wisconsin As Amici Curiae Supporting Petitioner

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TABLE OF CONTENTS

Page

Table Of Contents i

Table Of Authorities ii

Interest Of The Amici Curiae 2

Summary Of Argument 3

Argument 4

A. The Ruling By The Administrative Law Judge Of The Federal Trade Commission Emphasizes That The Residents Of Connecticut And Wisconsin May Have Been Substantially Harmed By The Refusal To Permit Opt Outs 4

B. The Decision By The Third Circuit Denying Opt Outs Is Contrary To This Court's Ruling In Shutts 10

Conclusion 14

TABLE OF AUTHORITIES

Cases: Page

Hansberry v. Lee, 311 U.S. 32 (1940) 11

In re TICOR Title Insurance Co., et al., FTC Dkt. No. 9190 (Dec. 22, 1986) 6

Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) 9, 10

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 12

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 4, 12, 13

Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) 5

Statutes and Rules:

Clayton Act, 15 U.S.C. § 15c 2

McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 7

Sup. Ct. R. 36.4 1

TABLE OF AUTHORITIES (cont'd)

Other Authorities:

Rosen, Title VII Classes And Due Process: To (b)(2) Or Not To (b)(3), 26 Wayne L.Rev. 919 (1980) 8

J. Cound, J. Friedenthal & A. Miller, Civil Procedure (2d ed. 1974) 11

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RESPONDENTS.

Brief For The States Of Connecticut And Wisconsin As Amici Curiae Supporting Petitioner

The States of Connecticut and Wisconsin respectfully submit this brief amici curiae pursuant to Supreme Court Rule 36.4.

INTEREST OF THE AMICI CURIAE

The attorneys general of the amici states are the chief law enforcement officials of their states. Accordingly, they have a significant interest in the proper application and interpretation of the laws of the United States. Because the decisions of the district court and the Third Circuit in this case conflict directly with established precedent of the Supreme Court, the amici states support granting the petition for writ of certiorari.

In addition, the attorneys general of the amici states are authorized by state statutes and section 4C of the Clayton Act, 15 U.S.C. § 15c, to represent the legal interests of the residents of their respective states. The class action judgment entered by the district court forecloses the individual damage claims of the class members in Connecticut and

Wisconsin without the class members being able to exercise their due process right to opt out. The attorneys general of Connecticut and Wisconsin have a direct interest in ensuring that the residents of their states at least have the opportunity to exercise the constitutionally-protected right to opt out of the class action.

SUMMARY OF ARGUMENT

A. The finding by the administrative law judge of the Federal Trade Commission that the defendant title insurance companies are not exempt from antitrust liability for their price fixing in Connecticut and Wisconsin emphasizes that the residents of those states may have been particularly harmed by the lower courts' refusal to permit opt outs. Although the residents of Connecticut and Wisconsin had strong claims for damages against the title insurance companies and thus a substantial interest in opting out

of the unsatisfactory class action settlement, the judgment forecloses their claims.

B. The refusal of the court of appeals and the district court to allow absent plaintiffs to opt out is directly contrary to Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). In Shutts, the Court held that due process requires the right to opt out in class actions seeking to bind absent plaintiffs concerning their claims for damages.

ARGUMENT

A. The Ruling By The Administrative Law Judge Of The Federal Trade Commission Emphasizes That The Residents Of Connecticut And Wisconsin May Have Been Substantially Harmed By The Refusal To Permit Opt Outs

In the proceedings before the district court, the attorneys general of several states filed an objection to the proposed class action settlement, arguing that the settlement provided a substantial amount

of money to the attorneys for the named plaintiffs, but essentially no relief at all to the class. The objecting states further argued that the effect of Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) (Court held that private anticompetitive conduct is immune from antitrust liability if state law permits the challenged activity and if the state supervises the activity), varies from state to state based on differences in each state's statutory and regulatory schemes. In particular, the State of Wisconsin argued that the defendant title insurance companies were not protected by the state action immunity defense because the necessary element of active state supervision was not present under Wisconsin's regulatory scheme.

Although the district court overruled the objection and entered judgment, the court expressed concern during a hearing

on April 10, 1986 that due process may be violated by foreclosing the damage claims of individual class members without affording them a right to opt out. The validity of the due process concerns expressed by the district court is dramatically highlighted by the subsequent ruling of the administrative law judge of the Federal Trade Commission, finding that the defendant title insurance companies had no state action defense for their price fixing activities in Connecticut and Wisconsin. In re TICOR Title Insurance Co., et al., FTC Dkt. No. 9190 (Dec. 22, 1986).[1/] The ruling shows that the

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[1/] In finding that the title insurance companies had no state action defense for their activities in Wisconsin, the administrative law judge relied upon the testimony of an official from the Wisconsin Office of the Commissioner of Insurance, who stated that Wisconsin did not actively supervise the price fixing activities at issue.

(Footnote 1 continued on page 7.)

states that filed an objection with the district court were correct -- the strength of the damage claims of consumers vary from state to state depending on each state's regulatory scheme. Moreover, the ruling by the administrative law judge of the Federal Trade Commission means that consumers in Connecticut and Wisconsin were substantially harmed by being denied the right to opt out of the class action settlement in that their strong claims for damages were foreclosed without ever having the opportunity to protect their

---

(Footnote 1 continued.)

In addition, the administrative law judge ruled that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, which generally exempts the "business of insurance" from federal antitrust liability, did not protect the price fixing activities of the title insurance companies in any state. This aspect of the administrative law judge's ruling is not limited to the companies' activities in Connecticut and Wisconsin.

interests by removing themselves from an inadequate settlement.

In a stark manner, the result here illustrates the due process dangers created when members of a non-cohesive class are denied the ability to opt out. These dangers were discussed by one commentator in the context of a non-cohesive class action for back pay. See Rosen, Title VII Classes And Due Process: To (b)(2) Or Not To (b)(3), 26 Wayne L.Rev. 919 (1980). The due process risk is that the class members will not be given the right to opt out, and then the class representative will not subsequently be successful in obtaining meaningful relief. All absent members will lose their claims for monetary relief and "will be strictly bound by the result and will go down with their representatives, despite the fact that they were never given an opportunity to be heard and,

indeed, may never have even known of the existence of the suit." Id. at 934. Here, genuine relief was not obtained for the residents of the amici states, and the damage claims of the residents went down with the settlement that afforded real relief only to the named plaintiffs' counsel. Moreover, because the residents were notified of the class action only by publication, it is an obvious fiction to state that the residents even knew of the existence of the suit.

In Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969), Judge Godbold in a special concurrence also recognized the due process pitfalls for absent class members in class actions seeking monetary relief:

> The broad brush approach of some of the Title VII cases is in sharp contrast to the diligence with which in other areas we carefully protect those whose rights may be affected by litigation. If this were an

> individual cross-action against an employee at one of appellee's remote terminals we would turn intellectual handsprings over questions of notice and process to him and opportunity to protect his interests -- such issues as whether the marshal dropped the notice at the door or handed it to the child at the front gate. But when the problems is multiplied many-fold, counsel, and at times the courts, are moving blithely ahead tacitly assuming all will be well for surely the plaintiff will win and manna will fall on all members of the class. It is not quite that easy.

417 F.2d at 1127 (emphasis added).

The ruling by the administrative law judge of the Federal Trade Commission shows that there was a substantial diversity among the class members. All class members should have been able to decide whether to opt out and prosecute their own litigation rather than be bound by an unsatisfactory settlement.

B. The Decision By The Third Circuit Denying Opt Outs Is Contrary To This Court's Ruling In Shutts

A class action is an exception to the general rule that the responsibility is on

the individual to authorize a lawyer to seek protection of the individual's rights in court. J. Cound, J. Friedenthal & A. Miller, Civil Procedure 1-2 (2d ed. 1974). Generally, litigation is grounded on a voluntary agency relationship between attorney and client. Conversely, in a class action, there is no voluntary agency relationship between the attorney and the absent class members. In fact, the absent class members may never even know that they are represented by the attorney. At least in part, the absence of the voluntary agency relationship creates the potential for due process violations in class actions.

Since at least as early as 1940, the Court has imposed due process requirements on class actions or other types of representative suits. In Hansberry v. Lee, 311 U.S. 32 (1940), the Court held that an individual could not be bound by a

judgment in a representative suit unless the named parties adequately represented the absent class members and the prosecution of the litigation was within the common interest.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), which involved a statutory action similar to a class action, the Court held that due process requires reasonable notice to be given to interested parties, apprising them of the pendency of the action.

The Court's most recent decision on the due process requirements applicable to class action is Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). The Court held that a class action judgment may bind an absent plaintiff concerning his claim for damages only if several due process protections are afforded. Citing Mullane, the Court stated that the absent plaintiffs must receive reasonable notice

of the litigation. 472 U.S. at 811. Citing Hansberry, the Court stated that due process requires the named plaintiff to represent the absent class members adequately at all times. 472 U.S. at 812. Most importantly, the Court ruled that due process requires the right to opt out in class actions seeking to bind absent plaintiffs concerning their claims for damages:

> Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

472 U.S. at 812.

The district court and the Third Circuit ignored Shutts and refused to permit opt outs. This contravention of due process has an especially harsh impact on the residents of the amici states because those residents may have had

viable claims for damages against the defendant title insurance companies.

CONCLUSION

For the foregoing reasons, the amici states respectfully request that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO BRIEF OF AMICI CURIAE SUPPORTING PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	i
ARGUMENT	
I. Connecticut And Wisconsin Are Not Proper Amici Curiae, And Their Brief Is An Attempt To Circumvent The Proper Procedures For Obtaining Review Of The Decision Below	1
II. The Brief Filed By Connecticut And Wisconsin Is Untimely	4
CONCLUSION	6

TABLE OF AUTHORITIES

CASES

Clark v. *Sandusky*, 205 F.2d 915 (7th Cir. 1953)	2
In re Real Estate Title and Settlement Services Antitrust Litigation, 1986-1 Trade Cas. (CCH) ¶ 67,149 (1985), *aff'd without op.*, 815 F.2d 695 (3d Cir. 1987)	3
International Union, United Automobile, Aerospace and Agricultural Implement Workers v. *Scofield*, 382 U.S. 205 (1965)	4
Miller-Wohl Co. v. *Commissioner of Labor and Industry*, 694 F.2d 203 (9th Cir. 1982)	1, 2
New England Patriots Football Club, Inc. v. *University of Colorado*, 592 F.2d 1196 (1st Cir. 1979)	2
Research Corp. v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970)	4

STATUTES AND RULES

28 U.S.C. § 1254	4
Supreme Court Rule 19.6	5
22	1, 5
36.1	4

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RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO BRIEF OF AMICI CURIAE SUPPORTING PETITIONER

ARGUMENT

This supplemental brief is filed by respondents pursuant to Supreme Court Rule 22.6 opposing the brief filed by the Attorneys General of Connecticut and Wisconsin, who purport to act as amici curiae.

I. Connecticut And Wisconsin Are Not Proper Amici Curiae, And Their Brief Is An Attempt To Circumvent The Proper Procedures For Obtaining Review Of The Decision Below.

The "classic role" of an amicus curiae is to assist the court "in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co.* v. *Commissioner of Labor and Industry*, 694 F.2d 203, 204 (9th Cir. 1982). A proper amicus curiae is not a party

to the litigation; the roles of party and amicus are "self-contradictory." *Id. Accord New England Patriots Football Club, Inc.* v. *University of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979); *Clark* v. *Sandusky*, 205 F.2d 915, 917 (7th Cir. 1953).

In their brief in this Court, Wisconsin and Connecticut assert that their interest in this litigation is a generalized concern as law enforcement agencies about the proper development of the law and the purported constitutional rights of the residents of their states. Brief at 2-3. In fact, their interest is not so vague or attenuated. Both states, as purchasers of title insurance for their own benefit, are members of the plaintiff class and have a direct stake in the outcome of this litigation.

Permitting Wisconsin and Connecticut to participate in the case at this late stage as amici curiae would improperly allow them to circumvent the established procedures for commenting on the settlement as class members and appealing from the decision of the district court. Wisconsin in fact participated in the case in the district court, joining with four other states in filing objections to the proposed settlement "on behalf of themselves as purchasers of title insurance."[1] Unlike the State of Arizona, however, it chose not to pursue an appeal from the district court's approval of the settlement and did not attempt to raise any arguments concerning the settlement in the court of appeals.

Although it was well aware of this litigation and the terms of the settlement, Connecticut chose not even to object to the proposed settlement in the district court, and did not attempt to raise any arguments about the settlement before the court of appeals. In fact, prior to

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[1] Joint Memorandum for the States of Montana, New Jersey, Ohio, and Wisconsin and the Commonwealth of Pennsylvania in Opposition to Final Approval of Proposed Settlement Agreement, at 1 (March 27, 1986).

the district court's approval of the settlement, the Connecticut Insurance Commissioner acknowledged receipt of a copy of the proposed settlement agreement and stated that the Connecticut Insurance Department "would have no objection were the settlement 'benefits' as contemplated by [the] agreement to be lawfully implemented in Connecticut following Court approval of the settlement." [2]

The contents of the brief filed by Connecticut and Wisconsin also belie their role as proper amici curiae. Rather than adding anything new to the arguments already presented to this Court, the brief merely repeats the incorrect legal analysis pressed by the petitioner, which respondents have already addressed in their Brief in Opposition to the petition.[3] Those legal arguments are matters

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[2] Letter of Peter W. Gillies, Insurance Commissioner of Connecticut, dated March 17, 1986, attached as Exhibit B to Memorandum of Defendants Addressing Objections to the Proposed Settlement Agreement (April 8, 1986).

[3] Connecticut and Wisconsin also make a number of unsupported factual assertions that are flatly inconsistent with the facts as found by the district court. For example, they declare: "[I]t is an obvious fiction to state that the residents [of Connecticut and Wisconsin] even knew of the existence of the suit." Brief at 9. However, the district court found that notice by publication had been broad and effective. *In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (1985), *aff'd without op.*, 815 F.2d 695 (3d Cir. 1987), reprinted in the Appendix to the Petition for Certiorari ("App. to Pet.") at 4a through 99a, 50a-51a. Approximately 600 members of the class responded to the notice by inquiring about it, including at least 36 residents of Connecticut and 31 residents of Wisconsin. App. to Pet. at 26a-27a; Memorandum of Defendants Addressing Objections to the Proposed Settlement Agreement, Exhibit G (April 8, 1986). Connecticut and Wisconsin also assert that "genuine relief was not obtained" by the settlement, that potential claims by residents of Connecticut and Wisconsin "were foreclosed" by the settlement "without [class members] ever having the opportunity to protect their interests," and that the settlement was "inadequate." Brief at 7, 8, 9. They offer no evidence or analysis

that could have and should have been raised by Connecticut and Wisconsin as objections to the settlement before the district court and on appeal to the Third Circuit.

Because they failed to pursue their appeal rights to the court of appeals, Connecticut and Wisconsin cannot now attack the court of appeals decision in this Court, even though as members of the class they would be bound by the district court's judgment. "Under [28 U.S.C. § 1254 (1)], only a 'party' to a case in the court of appeals may seek review here." *International Union, United Automobile, Aerospace and Agricultural Implement Workers* v. *Scofield*, 382 U.S. 205, 208-209 (1965).[4] It is not too much to expect that class members, particularly those that are state governments, will honor established procedures in the district court and court of appeals for commenting on and appealing from the approval of a class action settlement. Connecticut and Wisconsin should not be permitted belatedly to circumvent those procedures by pretending to play the role of amici curiae.

II. The Brief Filed By Connecticut And Wisconsin Is Untimely.

Connecticut and Wisconsin have neglected as well to comply with this Court's rules establishing the schedule for filing amicus briefs. An amicus curiae brief may be filed only if submitted within the time allowed for filing the brief in opposition to the petition for certiorari. Sup. Ct. R. 36.1. A respondent has 30 days "after receipt of a

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to justify these assertions, which are flatly contrary to the district court's findings and conclusions. App. to Pet. at 50a-51a, 88a, 94a, 98a-99a.

[4] Connecticut's failure to avail itself of the district court's procedures for class members to object to the settlement would properly have precluded that state's participation in the case even in the court of appeals. *See Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059, 1060-61 (7th Cir. 1970).

petition" within which to file an opposing brief. Sup. Ct. R. 22.1. Accordingly, an amicus curiae brief in support of a petition for certiorari must be filed within 30 days after the respondent receives the petition.

Neither the Attorney General of Connecticut nor the Attorney General of Wisconsin inquired when the Petition was received by respondents. The Attorney General of Arizona, who apparently was the one who actually filed and served Connecticut and Wisconsin's brief, also did not inquire when the Petition was received by respondents.[5] If any of these state officials had inquired, they would have learned that respondents' counsel received the Petition on June 2, 1987,[6] and that both the Brief in Opposition and the purported amicus brief were due on July 2, 1987. In fact, the brief filed by Connecticut and Wisconsin was not filed until July 6, 1987, and therefore was untimely.[7]

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[5] Copies of the Connecticut and Wisconsin brief were received by respondents in envelopes bearing a Phoenix postmark and the Arizona Attorney General's return address.

[6] Attorneys in the firm of Bell, Boyd & Lloyd, counsel for two of the respondents, Chicago Title Insurance Company and SAFECO Title Insurance Company, received a copy of the Petition for Certiorari on June 2, 1987. Counsel for other respondents received their copies on June 3 and June 4.

[7] Assuming that Connecticut and Wisconsin properly had perfected their appeal rights and attempted to support Arizona's petition as parties in this Court, their brief would be even more untimely. A party's responsive brief supporting a petition for certiorari must be filed within 20 days (not 30) following receipt of the petition. Sup. Ct. R. 19.6. Under this provision, the brief would have been due on or about June 22, fully two weeks before the date it was actually filed.

CONCLUSION

For all of the reasons stated above, the brief submitted by Connecticut and Wisconsin is not properly before this Court.

Respectfully submitted,

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